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No. 02-1675

Supreme Court, U.S.
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In The
# Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION, *et al.*,

*Appellants,*

v.

FEDERAL ELECTION COMMISSION, *et al.*,

*Appellees.*

**On Appeal From The United States District Court For The District Of Columbia**

## BRIEF FOR APPELLANTS THE NATIONAL RIFLE ASSOCIATION, *ET AL.*

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## QUESTIONS PRESENTED

1. Whether Congress restricted corporate and union "electioneering communications" about candidates in Title II of the Bipartisan Campaign Reform Act of 2002 ("BCRA") in order to serve a compelling governmental purpose, as required by the First Amendment to the United States Constitution.

2. Whether Congress adopted the least restrictive means of regulating political speech by flatly prohibiting "electioneering communications" by both nonprofit 501(c)(4) corporations and for-profit corporations alike in Section 204 of BCRA, rather than permitting 501(c)(4) corporations to fund such communications exclusively with individual contributions, as was initially contemplated in Section 203(b).

3. Whether Congress adequately tailored the definitions of "electioneering communications" in Section 201 of BCRA to serve the anti-corruption purpose proffered in support of those definitions.

4. Whether Congress violated the Equal Protection guarantee of the Fifth Amendment by granting a special exemption in Section 201 of BCRA for political speech by corporations that own broadcast facilities, as opposed to all other corporations whose identical speech constitutes forbidden "electioneering communications."

## PARTIES TO THE PROCEEDINGS

Appellants in this case, No. 02-1675, plaintiffs in the court below, are the National Rifle Association ("NRA") and the National Rifle Association Political Victory Fund ("PVF"), a Political Action Committee ("PAC") of the NRA.*

Appellees, defendants or intervenor-defendants below, are the Federal Election Commission and its Commissioners; the Federal Communications Commission; the United States of America; Senator John McCain; Senator Russell Feingold; Representative Christopher Shays; Representative Martin Meehan; Senator Olympia Snowe; and Senator James Jeffords.

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* As stated in appellants' jurisdictional statement, neither appellant has a parent corporation, and no publicly held company owns 10% or more of the stock of either appellant.



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## OPINIONS BELOW

The opinions and order of the district court are reported at 251 F. Supp. 2d 176 (D.D.C. May 1, 2003) and are reprinted in the supplemental appendix to the jurisdictional statements ("S.A.") filed in the cases consolidated with *McConnell v. FEC*, No. 02-1674. *See* S.A. 1-1382.

## JURISDICTION

The District Court entered judgment on May 1, 2003. Appellants the National Rifle Association (the "NRA") and the NRA Political Victory Fund (the "PVF") filed their timely notice of appeal on May 5, 2003. This Court has appellate jurisdiction under § 403(a)(3) of BCRA.

## PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First and Fifth Amendments to the United States Constitution, and relevant provisions of BCRA, are reproduced at App. 5a-6a and 20a-29a of the NRA's jurisdictional statement.

## STATEMENT[1]

The NRA is a nonprofit, voluntary membership corporation qualified as tax-exempt under 26 U.S.C. § 501(c)(4). Its four million members are individual Americans bound together by a common desire to ensure the preservation of the Second Amendment right to keep and bear arms. S.A. 219 ¶2 (Henderson). "The NRA's frequent references to candidates for federal office and the programming it broadcasts throughout the election cycle – including the period immediately preceding primaries and

[1] In order to avoid unnecessary duplication, this statement relies upon the brief filed by appellants in *McConnell v. FEC*, No. 02-1674, for a more detailed description of Title II of the Bipartisan Campaign Reform Act ("BCRA") and the procedural background of this litigation.

general elections – are essential to its political mission of educating the public about Second Amendment and related firearm issues." S.A. 256 (Henderson). In 2000, it paid for more speech on television – over 300,000 minutes – than all other issue advocacy groups and unions combined. *See* Joint Appendix ("J.A.") 367.[2]

The NRA's political speech furthers a variety of purposes: the NRA educates and informs its members and the public about specific legislative threats to Second Amendment rights, as well as broader political and cultural pressures on gun rights; the NRA also defends itself against attacks on its positions and reputation made by the media and by anti-NRA politicians; and the NRA recruits members and raises funds throughout the year. In almost all of this speech, the NRA refers to federal officeholders and candidates. S.A. 256 ¶51 (Henderson). And yet the vast bulk of its political speech that furthered these purposes in 2000 was not intended to influence a federal election. *See* J.A. 368, 380, 384-85.[3] The PVF is a political committee within the meaning of 2 U.S.C. § 431(4) and is a separate segregated fund of the NRA. The PVF runs ads that expressly advocate the defeat or election of a candidate.

The NRA funds its speech almost exclusively with dues and contributions from individual members. The

[2] The record in the District Court included two volumes of appendices and a supplemental appendix filed by the NRA, which are cited as they appear in the Joint Appendix or, alternatively, in the record below; various portions of the record below are cited as they can be found in Plaintiffs' Consolidated Submission ("PCS") or Deposition Transcripts Unified Filing. Attached hereto is an appendix of relevant legislative history referred to as "LH App."

[3] To be sure, in 2000 the NRA also aired approximately 30,000 minutes of speech designed to, among other things, inform the public of the grave threat that Vice President Gore's presidential candidacy posed to Americans' Second Amendment rights. *See* S.A. 234-35 ¶42a (Henderson); S.A. 695 ¶2.6.4.3 (Kollar-Kotelly); J.A. 383.



organization does not accept business corporations as members and the contributions that it receives from such corporations are negligible (approximately $385,000 in 2000), especially in relation to its income from the dues and contributions of individual members (approximately $140 million in 2000). *See* S.A. 258-59 ¶51f (Henderson); J.A. 1963; J.A. 386. The average individual contribution to the NRA is $30. S.A. 89 ¶41 (Per Curiam); S.A. 258 ¶51f (Henderson). In short, the NRA is an organization comprised of ordinary Americans of moderate means who join their voices in a common effort to defend, promote, and enjoy a constitutional freedom that is precious to them.

## INTRODUCTION AND SUMMARY OF ARGUMENT

> "[A] representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it."

*New York Times Co. v. Sullivan*, 376 U.S. 254, 297 (1964) (Black, J., joined by Douglas, J., concurring) (quoting 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES (1803), 297 (editor's appendix)). If there is truth in this proposition, and this Court has reiterated it in many cases, then Title II of BCRA cannot stand, for it bans, on pain of criminal sanction, independent expenditures for broadcasting "opinions . . . upon the conduct of those who may advise or execute" public measures. It is, after all, references to candidates for federal office that the NRA and similar issue advocacy organizations are restricted by Title II from broadcasting during an election campaign.

Title II's purpose is to severely restrict the quantity and content of core political speech, a purpose that is "wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 49 (1976). This is irrefutably clear from the

plain words of the statute itself; from the floor statements of legislators who supported the measure; from the sworn testimony of BCRA's main sponsors, who intervened in this litigation; from the law's clearly foreseeable effect of suppressing political speech; and even from the Intervenors' own brief below, which candidly blamed "the *amount* of general treasury funds at the disposal" of "interest groups" like the NRA for the "explosion" in recent years of issue ads – or "negative attack ads," in their vernacular. Intervenors' Opening Br. 104 (filed Nov. 6, 2002) (emphasis added). Indeed, the Government and the Intervenors (collectively "Defendants") went to great lengths to establish that this explosion in political speech was the predicate for, and specific target of, Title II. BCRA bans speech to precisely the extent that it succeeds in its goal of muffling this explosion.

This Court's decisions have consistently drawn an outcome-determinative distinction between legislative restrictions on independent political *expenditures* and on direct campaign *contributions*. Because independent expenditures, in contrast to campaign contributions, produce "core First Amendment expression" and pose little "danger[] of real or apparent corruption," *Buckley,* 424 U.S. at 48, 46, this Court has, with one exception, consistently struck down expenditure limits as failing to narrowly serve the compelling government interest of preventing corruption of the electoral process. Title II fares no better. To be sure, Defendants introduced in the District Court a mountain of evidence in support of their claim that the current campaign finance system is widely perceived to corrupt the political process. But that evidence relates almost entirely to the corrupting influence of unregulated "soft money" campaign contributions, which are addressed by Title I. The record contains no substantial evidence that the public regards political ads aired by advocacy groups as corrupting or in any way differentiates them from ads funded by PACs.

Nor can Title II find shelter in the only decision of this Court upholding an expenditure limit, *Austin v. Michigan State Chamber of Commerce,* 494 U.S. 652 (1990). Title II's



purpose, according to the Government, is merely "to ensure that [independent electioneering] spending 'reflect[s] actual public support for the political ideas espoused by corporations and unions, rather than their success in the economic marketplace, *Austin*, 494 U.S. at 660. . . . " Gov't Opp'n Br. 56 (filed Nov. 20, 2002). But *Austin* simply cannot be made to support a speech restriction that extends any further than is necessary to ensure that a nonprofit advocacy group's independent political spending bears a fair and reasonable "correlation to the public's support for the corporation's political ideas," 494 U.S. 660, as measured by the financial support of individual members rather than business corporations. The NRA, in contrast to trade or business associations, derives only a miniscule portion of its revenues from corporate contributions. It is funded almost exclusively by membership dues of approximately four million individuals of ordinary means, the vast bulk of whom cannot afford to make an additional donation to the NRA's PAC, the PVF, as is required under Title II in order to fund an electioneering communication. Thus, far from preventing the NRA's political voice from being unfairly inflated by funds derived from the economic marketplace, Title II reduces the NRA's political voice to a whisper when compared to its actual public support in the political marketplace. By channeling the NRA's political speech through its PAC, Title II artificially impedes the ability of ordinary Americans of modest means to participate effectively in our democracy. And *that* is the measure's avowed purpose; it cannot be intelligibly understood except as a naked effort to suppress political speech for its own sake.

But even if one looks past this dispositive refutation of the claim that Title II was designed to prevent *Austin*-type corruption of the electoral process, the measure nonetheless must fall, for there were less restrictive means available to Congress to ensure that the political voices of grassroots issue advocacy groups like the NRA were not unfairly inflated by contributions from business corporations. Indeed, Congress enacted a less restrictive alternative in Title II itself: the original "Snowe-Jeffords" version

of Title II would have exempted electioneering communications by 501(c)(4) advocacy groups like the NRA, so long as they were "paid for exclusively by funds provided directly by individuals." BCRA § 203(b) (adding to U.S.C. § 441b(c)(2)). The so-called "Wellstone Amendment," however, negated the Snowe-Jeffords Provision, *see* § 204 (adding 2 U.S.C. § 441b(c)(6)), for the specific purpose of extending Title II to nonprofit issue advocacy organizations.

Senators McCain and Feingold and the other sponsors of BCRA *opposed* the Wellstone Amendment, not because they valued the political speech of the NRA and other grassroots advocacy groups that the amendment would stifle, but because they believed that the amendment would likely be struck down by this Court as unconstitutional. BCRA's opponents overwhelmingly supported the amendment, presumably for this very reason. BCRA's sponsors therefore insisted both that a severability clause be enacted and that the original Snowe-Jeffords language remain in the bill, so that invalidation of the Wellstone Amendment would not threaten Title II as a whole. If the Wellstone Amendment is upheld, it will mark the first time in our Nation's history that the Court has sanctioned a content-based restriction on core political speech funded by like-minded individuals.

Even if Title II did not suffer from the foregoing constitutional flaws, it is fatally overbroad for two independent reasons. First, BCRA regulates *speakers* that pose no threat of corruption. Simply put, there is no threat of corruption (or the appearance thereof) arising from like-minded individuals pooling their resources in a grassroots advocacy organization. Indeed, such collective action is the only way that citizens of ordinary means can have their voice heard in the mass media. Second, Title II sweeps within its restriction entire categories of speech that are wholly divorced from the measure's alleged target of speech intended to influence an election. An issue advocacy organization typically names federal officeholders and candidates for innumerable reasons, ranging from the need to educate the public about threats to the groups' beliefs, to defending itself against direct attacks launched



by the politicians themselves. One could not have decried McCarthyism without mentioning McCarthy. And, as Judge Henderson found, when the NRA's speech is properly taken into account, more than a third of the broadcasts that Title II would have criminalized in the 2000 cycle were genuine issue ads unrelated to a federal election.

Finally, Title II carves out an exception for the electioneering communications of broadcast media companies. This media exception to Title II renders the measure unconstitutional in its entirety. This Court has consistently rejected the proposition that the institutional press has special First Amendment rights, and thus any speaker-based preference must be justified by a compelling governmental interest. Here, there is no such rationale. The factual predicates found in *Austin* to be sufficient to justify such a media exception simply no longer exist. With more Americans using the Internet than reading a daily newspaper, the broadcast media no longer play a "unique" role in "informing and educating" the public. 494 U.S. at 667. And with some of the world's largest multinational conglomerates now dominating the media industry, the notion that "media corporations differ significantly from other corporations" is plainly antiquated. *Id.* If grassroots advocacy organizations funded by their individual members truly pose a meaningful threat of an appearance of corruption, then surely so do the likes of Microsoft, Disney, General Electric, and AOL TimeWarner, each of which owns national television channels.

## ARGUMENT

### I. TITLE II'S PURPOSE IS TO STIFLE CORE POLITICAL SPEECH.

> *These groups often run ads that the candidates themselves disapprove of. Further, these ads are almost always negative attack ads and do little to further beneficial debate and a healthy political dialog. To be honest, they simply drive up an individual candidate's negative polling numbers*

*and increase public cynicism for public service in general.*

– Senator John McCain (LH App. 1a).

Thus did Senator McCain urge enactment of Title II's restriction on the rights of "these groups" to air advertisements critical of him during an election campaign. Title II creates a new crime and a new class of felons: corporations and unions that engage in "electioneering communications," which are defined as "[a]ny broadcast, cable, or satellite communication which ... refers to a clearly identified candidate for federal office ... 60 days before a general, special, or runoff election for the office sought by the candidate; or ... 30 days before a primary or preference election.... " BCRA § 201(a) (adding new FECA § 304(f)).[4] To be sure, Title II's restrictions on electoral speech are indifferent to whether the ads seek to bury Caesar or to praise him; they criminalize positive ads as well as negative. But the world has never seen, and never will see, a law *aimed at praise* of the lawmakers. And, in any event, sponsors and supporters of Title II in Congress made no bones about their target. One supporter after another openly echoed Senator McCain's complaint against "negative attack ads":[5]

[4] Title II also includes a fallback definition of "electioneering communication," to take effect only if the primary definition is held "constitutionally insufficient." *Id*. The NRA has already explained in an emergency stay application to the Chief Justice that the truncated version of that fallback definition, as revised by Judge Leon and upheld by the District Court, is unconstitutional. The NRA therefore will not belabor those arguments here but, instead, incorporates them by reference. No matter its precise form, however, the fallback definition suffers from the same constitutional defects outlined herein with respect to the primary definition.

[5] Congress's purpose to stifle disfavored speech is further *inscribed upon the statute itself*, which grants "a free pass" to those electioneering communications that travel through newspaper and direct mail ads or are broadcast by media corporations, although such communications pose the *very same* corruption concerns now invoked by Defendants. *See*

(Continued on following page)



- Sen. McCain: "I hope that we will not allow our attention to be distracted from the real issues at hand – how to raise the tenor of the debate in our elections and give people real choices. No one benefits from negative ads. They don't aid our Nation's political dialog." (LH App. 3a).

- Senator Wellstone: "I think these issue advocacy ads are a nightmare. I think all of us should hate them.... We could get some of this poison politics off television." (LH App. 8a).

- Senator Jeffords: "[Issue ads] are obviously pointed at positions that are taken by you saying how horrible they are.... The opposition comes forth with this barrage [of ads] and you are totally helpless." (LH App. 5a).

- Senator Cantwell: "[Title II] is about slowing political advertising and making sure the flow of negative ads by outside interest groups does not continue to permeate the airwaves." (LH App. 9a).

- Senator Boxer: "We have an opportunity in the McCain-Feingold bill to stop [negative ads] and basically say, if you want to talk about an issue, that is fine, but you can't mention a candidate.... " (LH App. 13a).

- Senator Daschle: "The 'issue ads' are more attack-oriented and personal." (LH App. 14a). "I believe that negative advertising is the crack cocaine of politics." (LH App. 14a).[6]

S.A. 364-65 (Henderson). This underinclusiveness fatally "diminish[es] the credibility of the government's rationale for restricting speech in the first place." *City of Ladue v. Gilleo*, 512 U.S. 43, 45 (1994).

[6] This is a small but representative sample of the statements made in the Senate and the House reflecting Congress's overriding concern with stifling negative advertising that it deemed offensive, and, indeed, pernicious. A more complete list of such statements, including full citations to the relevant pages of the congressional record, is assembled in the legislative history appendix to this brief. *See* LH App. 1a-39a. It is also apparent from the legislative record that Congress was intent upon

(Continued on following page)

And in defending the measure as an intervenor to this case, Senator McCain confirmed that Congress specifically targeted speech critical of candidates for federal office: "The real world is that the overwhelming majority of ads that we see running today are attack ads that are called issue ads, which are direct, blatant attacks on the candidates. . . . We don't think that's right." J.A. 936.[7]

A. In targeting issue ads by corporations and unions, Title II is of a piece with the rest of BCRA, the overarching thrust of which is to "insulate[] legislators from effective electoral challenge." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 404 (2000) (Breyer, J., concurring). All agree that money plays a pivotal role in the American political system given the necessity and enormous expense of communicating political speech through the broadcast media, especially television. *See FEC v. NCPAC*, 470 U.S. 480, 494 (1985). In a transparent effort to protect their own incumbencies, BCRA's proponents sought to dry up every source of funds for such political speech except so-called "hard money" funds raised from individuals and PACs, the two sources of funds in which incumbents have a gigantic advantage over challengers. *See* NRA App. 119. And BCRA doubles the limits on individual contributions to candidates. As an additional measure of protection, Congress further leveraged the "media-related advantages

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repelling what it viewed as intrusion by outside groups, with their independent political ads, upon candidates' ability to control their own campaign agendas; according to Senator Boxer, for instance, the ads of outside groups "bring[] in other issues that the two candidates themselves do not even want to talk about." LH App. 40a; *see also id.* 40a-45a.

[7] The intervening defendants consistently echoed this theme in their sworn testimony. *See, e.g.*, J.A. 939-40; J.A. 914-15; J.A. 902; J.A. 906; J.A. 910; J.A. 972; J.A. 749.



of incumbency" by exempting media corporations from Title II's restrictions. *Shrink*, 528 U.S. at 404 (Breyer, J., concurring). *See* Appendix to Brief for Appellants Congressman Ron Paul, *et al.*, at 29a (filed July 8, 2003) (media exception confers "considerable advantage" upon incumbents by virtue of their access to "inside information" about the legislative process).

With this sharply skewed playing field in place, only two threats to incumbents remained. First, the threat of "outside interest groups" airing "negative attack ads" was quashed by Title II. Second, Congress responded to the threat of challenges from wealthy, self-funded candidates by raising the contribution limits for candidates who face such a challenge. Given that all of BCRA's provisions operate to the advantage of incumbents, the political class's age-old instinct for self-preservation is readily apparent. *See Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (effects of a law are probative of statutory intent). This Court should not defer to Congress's (or more accurately the Justice Department's) asserted rationales where, as here, "that deference . . . risk[s] such constitutional evils as, say, permitting incumbents to insulate themselves against effective electoral challenge." *Shrink*, 528 U.S. at 402 (Breyer, J., concurring).

B. When viewed against the long and largely doleful history of governments among men, Title II's restraint on "electioneering communications" is entirely unremarkable – just another example of the "standard practice" of the governors "us[ing] the criminal law to insulate themselves from disagreement" by the governed. ANTHONY LEWIS, MAKE NO LAW 52 (Random House, 1991). Even in our open democratic society, Title II's restraint on electoral speech is not without its chilling historical antecedents. The infamous Sedition Act of 1798, like Title II, was specifically

aimed at stifling speech critical of the Government and its elected members.[8]

Proponents of the Sedition Act in the 5th Congress, like BCRA's supporters in the 107th, decried "malicious calumnies against Government," speech designed to "inflame ... constituents against the Government," publications "calculated to destroy ... every ligament that unites ... man to society and to Government," and "representations [that] are outrages on the national authority, which ought not to be suffered." 11 PCS/NRA 111-13. Opponents of the Sedition Act in Congress, like opponents of BCRA, argued then, as we do now:

> This bill and its supporters suppose, in fact, that whoever dislikes the measures ... of a temporary majority in Congress, and shall ... express his disapprobation and his want of confidence in the men now in power, is seditious and is liable to punishment. ... If you thus deprive the people of the means of obtaining information of their conduct, you in fact render their right of electing nugatory; and this bill must be considered only as a weapon used by a party now in power, in order to perpetuate their authority and preserve their present places.

11 PCS/NRA 114.[9]

The Sedition Act never reached this Court, but in *New York Times Co. v. Sullivan*, 376 U.S. at 276, the Court

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[8] *See* S.A. 259-60 ¶51g (Henderson); 11 PCS/NRA 109-10. The Act made it a crime, punishable by a $5000 fine and five years in prison, "if any person shall write, print, utter or publish ... any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress ..., or the President ... with intent to defame ... or to bring them ... into contempt or disrepute; or to excite against them ... the hatred of the good people of the United States." 1 Stat. 596, *quoted in New York Times Co. v. Sullivan*, 376 U.S. at 273-74.

[9] Opponents of BCRA in Congress arrestingly made the same points. *See* LH App. 46a-51a.



unanimously acknowledged that the Act, "because of the restraint it imposed upon criticism of government and public officials," had been universally condemned "in the court of history" as a blatant infringement on the freedom of speech. If history's judgment on the Sedition Act is correct, then Title II's modern version of it must fall.

C. Nor can Title II's limitation on electoral speech be reconciled with this Court's holding in *New York Times Co. v. Sullivan*. At the heart of that case was a political advertisement run in the NEW YORK TIMES by an "interest group" – the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South." The ad was found to refer to an elected official and to falsely criticize his handling of civil rights protests in Montgomery, Alabama. The issue was whether the First Amendment "limit[s] a State's power to award damages in a libel action brought by a public official against critics of his official conduct." *Id.* at 256. Emphasizing that "[i]t is as much [the citizen's] duty to criticize as it is the official's duty to administer," *id.* at 283, the Court held that the First Amendment prohibits such an action unless the public official can show that the defamatory statement was made with actual malice. The *Sullivan* Court's reasoning is equally dispositive of Title II.

At the heart of the Court's unanimous ruling was its recognition that *political speech* is the lifeblood of our representative democracy and that "debate on public issues should be uninhibited, robust, and wide-open." *Id.* at 270. That the political speech at issue was contained in a paid advertisement was irrelevant; the First Amendment protects "persons who do not themselves have access to publishing facilities" no less than it protects the press. *Id.* at 266. Nor did the advertisement's false and defamatory nature suffice to deprive it of First Amendment protection, for "erroneous statement is inevitable in free debate, and ... it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need ... to survive.'" *Id.* at 271-72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). And the *Sullivan* Court emphasized, over and over again, that speech concerning

the conduct of public officials and candidates for public office is essential to the vitality of democracy itself. Quoting Mr. Madison's Report on the Virginia Resolutions denouncing the Sedition Act, the Court said this: "The value and efficacy of this right [to vote] depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively." *Id.* at 275 (citation omitted).[10]

In the record before this Court are hundreds, perhaps thousands, of the "negative attack ads" that Title II seeks to rid from the airwaves. To dispose of this case, it is enough to note simply that *every single one of them* would be protected by the First Amendment from a libel action brought by the attacked candidate. But Title II cuts even deeper into the heart of the First Amendment than did the defamation action invalidated in *Sullivan*. Title II goes beyond just rendering speech actionable in tort; it *criminalizes* speech outright and punishes the speaker with imprisonment. Title II goes beyond just reaching and restraining false speech; it reaches and penalizes *the truth*. Title II goes beyond just restraining political speech, it targets *electoral* speech about candidates for public office during the weeks before citizens go to the polls.

Thus, Title II's restrictions on electioneering communications violate the most fundamental postulates of the First Amendment. The same conclusion flows from this Court's campaign finance cases, as we demonstrate in detail below.

[10] The Court has consistently held "that legislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment." *Buckley v. Valeo*, 424 U.S. at 50 (citing *Mills v. Alabama*, 384 U.S. 214 (1966), and *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974)).



## II. TITLE II'S RESTRICTIONS ON "ELECTIONEERING COMMUNICATIONS" CANNOT BE JUSTIFIED AS PREVENTING CORRUPTION.

### A. Title II Was Not Designed To Prevent Corruption.

From *Buckley* in 1976 to *FEC v. Beaumont* earlier this Term, this Court has consistently emphasized the "'fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign.'" *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 614-16 (1996) ("*Colorado Republican I*") (quoting *NCPAC*, 470 U.S. at 497-98); *see, e.g., FEC v. Beaumont*, 123 S. Ct. 2200, slip op. at 8 (June 16, 2003). Because of differences in both their expressive value and corrupting potential, "limits on political expenditures deserve closer scrutiny than restrictions on political contributions." *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 440-41 (2001) ("*Colorado Republican II*").

Emphasizing that political expenditures "produce speech at the core of the First Amendment," *NCPAC*, 470 U.S. at 493, and pose little threat of political corruption, this Court has "routinely struck down limitations on independent expenditures" under strict scrutiny. *Colorado Republican II*, 533 U.S. at 441. In contrast, campaign contribution limits have consistently been upheld under "relatively complaisant review" because "contributions lie closer to the edges than to the core of political expression," *Beaumont*, slip op. at 14, and they entail "a plain threat to political integrity and a plain warrant to counter the appearance and reality of corruption. . . ." *Id.* at 8.

Defendants are well aware that Title II is subject to strict scrutiny, so they attempt to cast Title II as designed to achieve the compelling government purpose of preventing actual or apparent political corruption. But the legislative record of Title II unequivocally establishes that Congress did not limit electioneering communications to protect officeholders from the corrupting influence of

"sham" issue ads. To the contrary, as demonstrated above, *supra* at 7-11, Title II's supporters made clear that it was aimed at "negative attack ads" that have "demeaned and degraded all of us" and "do little to further the official debate."

To fill this void in the *legislative* record, Defendants attempted below to create a post-enactment *litigation* record, comprising solicited testimony from political consultants, lobbyists, and former politicians. But to sustain a content-based restriction on political speech, the Government must establish that *the purpose that actually animated enactment* of the measure is compelling and is narrowly served by the restriction. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) ("The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation."); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 191 (1997).[11] Therefore, neither Defendants nor this Court can go beyond Title II's text and legislative history in the effort to discern and evaluate "the disease sought to be cured" by its limits on electioneering communications. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (quotation and citation omitted). And Congress's avowed purpose – to stifle the airing of "negative attack ads" – is not even a legitimate, let alone a compelling, governmental purpose.[12]

But even if Defendants' anti-corruption rationales for Title II were not foreclosed as a matter of law, they fail as a matter of fact, as we demonstrate below.

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[11] The Government may defend a statute based upon a "conceivable" or "hypothetical" legislative purpose *only* when that statute is being reviewed under mere "rational basis" scrutiny. *See, e.g., Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 373 (2002).

[12] If Defendants could extract *any* arguably legitimate purpose from the actual legislative record, that purpose would extend only so far as the *disclosure* requirements of Title II (as opposed to the prohibition on corporate speech), which are "the least restrictive means of curbing the evils of campaign ignorance and corruption." *Buckley*, 424 U.S. at 68.



### B. Gratitude For Political Support Is Not Corruption.

Defendants' concept of political corruption is far removed from the record of "*quid pro quo*" arrangements that concerned this Court in *Buckley*. *See* 424 U.S. at 26 & n.28. To Defendants, a politician who is, as they put it, "naturally grateful" to an organization that runs an issue ad in his favor is a politician on the take. But this is not "corruption" – this is the democratic process. Elected officials are indeed grateful for any support for their campaigns, whether it takes the form of the ballot of a single constituent, or the endorsement of an organization with millions of members, or the speech of supporters extolling the candidate's virtues or decrying the opponent's vices. And those who provide such support do indeed expect that, if the campaign is successful, the official will cast votes in a way that reflects the shared political ideals that inspired the support in the first place. This is called "democracy."

Defendants, however, see corruption in the natural functioning of our representative democracy, and if their concept of political corruption is allowed to take root in this Court's First Amendment jurisprudence, then no political activity is safe from congressional regulation.[13] One need not think long to grasp that if a candidate's natural gratitude to the NRA for helpful "electioneering communications" is corruption enough to justify silencing

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[13] Defendants' novel and expansive theory of corruption *qua* gratitude was adopted by Judge Kollar-Kotelly, who opined that candidates are "as beholden to corporations . . . that spend money to help them through ad campaigns as they would be if the same entities wrote a check directly to the campaign." S.A. 838 (Kollar-Kotelly). That notion, which is bereft of evidence to support it, would obliterate this Court's consistent distinction between contributions and expenditures, leaving *any* independent expenditure – be it that of a PAC, an individual, or some other entity – fully subject to regulation because it can simply be equated, in the words of Judge Kollar-Kotelly, with a "check . . . to the campaign."

such political speech, then what is to stop the Government when it trains its sights on, say, the NRA's speech endorsing a candidate and urging its membership to rally behind him? This Court, therefore, has specifically rejected Defendants' notion of corruption. "The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view." *NCPAC*, 470 U.S. at 498.

As previously noted, Defendants can offer nothing from Title II's *legislative* record demonstrating a link between "electioneering communications" and political corruption, so they attempted in the District Court to fill that void with a *litigation* record. To be sure, Defendants offered a massive evidentiary record in support of their claim of political corruption, but it relates almost exclusively to the corrupting influence of soft-money donations banned by Title I (thus confirming the fundamental distinction in the corrupting potential of contributions versus expenditures).[14] As Judge Henderson found: "None

[14] The cavernous disparity in record evidence supporting Defendants' theory of corruption with respect to contributions regulated by Title I, as opposed to expenditures regulated by Title II, is manifest from the opinions below, particularly that of Judge Kollar-Kotelly. *Compare* S.A. 589 ¶1.75 (Kollar-Kotelly) ("The record is a *treasure trove* of testimony from Members of Congress, individual and corporate donors, and lobbyists, as well as documentary evidence, establishing that *contributions* . . . are given with the expectation they will provide the donor with access to federal officials, that this expectation is fostered by the national parties, and that this expectation is often realized.") (emphases added); S.A. 567 ¶1.63; S.A. 582 ¶1.73; S.A. 625 ¶1.82; S.A. 574 ¶1.70; S.A. 626 ¶1.83; S.A. 633-34 ¶1.83.5; S.A. 635-36 ¶1.84; *with* S.A. 718-19 ¶2.7.11 (Kollar-Kotelly) (finding no "direct examples of votes being exchanged for candidate-centered issue advocacy expenditures" but "that candidates and parties appreciate and encourage corporations . . . to deploy their large aggregations of wealth into the political process. If nothing else, I find that the record presents

(Continued on following page)



of the evidence the defendants have offered materially supports the proposition that corporate and labor disbursements for issue advocacy corrupt or appear to corrupt federal candidates." S.A. 274-75 ¶54b (Henderson). Indeed Defendants' token evidence relating to issue ads actually undermines their anti-corruption rationale, even under their "gratitude" theory of corruption. Media consultant Strother agreed that there is "nothing in any way corrupt or undemocratic about the enterprise . . . of airing these political broadcasts." J.A. 1031. And Senator Simpson, when asked whether advocacy groups should be entitled to run electioneering communications, stated that "[a]s long as people know who they are and what they're doing, yes, I think that's all right. Then you're into the First Amendment." J.A. 1013-14; *see also* J.A. 1021, Deposition Transcripts Unified Filing at Simpson Dep. 79. Indeed, he testified that it is "the essence of politics" to try to influence legislators. J.A. 1016-19. None of Defendants' declarants could testify to a single instance in which a candidate or office-holder had changed his or her vote in exchange for an advocacy group's speech,[15] nor could any even provide an example of a politician showing "gratitude" to an advocacy group.[16]

an appearance of corruption stemming from the dependence of officeholders and parties on advertisements run by these outside groups."). Similarly, Judge Leon found specific evidence of an appearance of corruption to justify Title I but made no such findings regarding Title II. *See* S.A. 1289 ¶250 (Leon) ("The defendants have offered substantial evidence that the public believes there is a direct correlation between the size of a donor's contribution to a political party and the amount of access to, and influence with, the officeholders . . . the donor enjoys thereafter."); S.A. 1289-95 ¶251-70 (Leon).

[15] *See* J.A. 846, 848-50; J.A. 1032; J.A. 1011-12.

[16] *See* J.A. 841-44; J.A. 1032-34. Indeed, lobbyist Andrews could not recall *any instance* of a politician expressing gratitude for issue ads that supported the politician or attacked an opponent. *See* J.A. 849-50. In the *only* concrete example of an issue group influencing a candidate, Strother related how a candidate decided to return money to an anti-gun group in order to avoid negative publicity from the NRA because

(Continued on following page)

### C. Title II Cannot Be Justified As Preventing *Austin*-style Corruption.

Core political speech is protected by the First Amendment regardless whether a corporation is the speaker. *Buckley*, 424 U.S. at 45, 50, 187; *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978); *FEC v. MCFL*, 479 U.S. 238, 259 (1986). Indeed, *MCFL* upheld a nonprofit voluntary membership corporation's First Amendment right to make unlimited independent expenditures to fund its political speech, including express advocacy. Only once, in *Austin*, has this Court upheld a restriction on independent expenditures for core political speech. The specific danger identified in *Austin*, corruption of the political process through the aggregation of wealth generated by business corporations, has no application to speech by nonprofit membership organizations that are devoted to the advancement of specific rights and ideas and are funded almost exclusively by the dues and donations of individual members. Title II of BCRA must therefore be struck down.

*MCFL* held that a voluntary membership organization committed to a political purpose does not lose its First Amendment rights simply by taking the corporate form:

> The resources in the treasury of a *business corporation* . . . are not an indication of popular support for the corporation's political ideas. . . .
>
> . . . .
>
> . . . Groups such as MCFL, however, do not pose that danger of corruption. MCFL was formed *to disseminate political ideas, not amass capital.*

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the candidate was running in a pro-gun state and feared how "the voter would react if it was disclosed where the check came from." J.A. 1035-36. Thus, the "influence" was based upon the power of the *voter*, which is hardly improper in a democracy. *See also* J.A. 838, 850-51.



> The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace.

479 U.S. at 258-59 (emphasis added). In contrast, *Austin* upheld a law restricting expenditures on express advocacy by the Chamber of Commerce because 75% of its funding came from for-profit corporations; the Chamber therefore could (and did) serve as a conduit for using "resources amassed in the economic marketplace" "to provide an unfair advantage in the political marketplace." *MCFL*, 479 U.S. at 257. The Court specifically observed that the Chamber's corporate wealth had "*little or no correlation* to the public's support for the corporation's political ideas." *Austin*, 494 U.S. at 660 (emphasis added).

*MCFL* and *Austin* thus draw a line between advocacy organizations that fund their speech with individual dues and trade associations that fund their speech largely with contributions from business corporations. The former, unlike the latter, pose no danger of corrupting the political marketplace through wealth generated in the economic marketplace.

This analysis of *Austin* and *MCFL* is confirmed by the Court's decision last month in *FEC v. Beaumont*, No. 02-403, 123 S. Ct. 2200, slip op. (June 16, 2003), which held that a restriction on corporate campaign *contributions* could constitutionally be applied to nonprofit advocacy organizations as well as business corporations. Slip op. at 10. *Beaumont* reaffirmed that the *Austin* rationale for restricting expenditures was to prevent corporations from "'us[ing] resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace.'" *Id.* at 6 (quoting *Austin*, 494 U.S. at 658-59) (internal citations omitted)). As demonstrated above, that problem is simply not presented by the NRA or similar nonprofit advocacy groups.

To be sure, *Beaumont* held that concerns about the corporate form of organization, even for a nonprofit advocacy organization funded by individual donations, were sufficient to sustain restrictions on campaign *contributions*

by such a corporation. *Id.* at 10-11. In other words, Congress may ban corporate campaign contributions in order to "bar[] corporate earnings from conversion into political 'war chests.'" *Id.* at 7. But, as the Court reaffirmed, contributions barely count as speech at all: "Going back to *Buckley v. Valeo*, restrictions on political contributions have been treated as merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment." *Id.* at 14 (citation omitted).

In contrast, independent political *expenditures* on campaign speech by nonprofit advocacy groups constitute "the core of political expression." *Id.* at 14. Independent political expenditures "do not pose that danger of corruption," and therefore the "'potential for unfair deployment of wealth for political purposes' f[alls] short of justifying a ban on expenditures" by such groups. *Id.* at 11. The rationales that sufficed to uphold restrictions on contributions in *Beaumont* cannot survive the strict scrutiny applicable to restrictions on expenditures for core political speech.[17] Indeed, that is why the First Amendment foreclosed Congress's attempt to regulate the independent expenditures of a corporate PAC in *NCPAC*. *See* 470 U.S. at 500-01.

The NRA is the archetypal issue advocacy group protected by the First Amendment. It "was formed to disseminate political ideas, not amass capital," and its members are "fully aware of its political purposes." *See* J.A. 1948-56; 11 PCS/NRA 137-56. The NRA's resources "are not a function of its success in the economic marketplace, but its popularity in the political marketplace." *MCFL*, 479 U.S. at 259. The NRA and similar grassroots advocacy organizations do not do business in

[17] *Beaumont* repeatedly reaffirmed this fundamental distinction between restrictions on contributions and expenditures. Slip op. at 4 & n.2, 8, 11, 14, 15. In particular, the Court distinguished the deference accorded legislative judgments about corruption "when Congress regulates campaign contributions" from the strict scrutiny applicable to expenditure restrictions. *Id.* at 8.



the "economic marketplace," nor derive "market profits," nor receive more than a negligible portion of their revenues from corporate contributions. In short, the NRA does not use "'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'" *Austin*, 494 U.S. at 659 (quoting *MCFL*, 479 U.S. at 259).[18] Title II's restriction on its independent electioneer expenditures is, therefore, unconstitutional.

### D. Title II Cannot Be Justified As Protecting The Members Of Advocacy Groups From Misuse Of Their Donations.

In *Beaumont* the Court noted that the federal ban on campaign contributions by corporations also "protect[s] 'the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed.'" Slip op. at 7 (quoting *FEC v. National Right to Work Comm.*, 459 U.S. 197, 208 (1982)). Yet the Court assumed (correctly) that "advocacy corporations are generally different from traditional business corporations in the improbability that contributions they might make would end up supporting causes that some of their members would not approve." *Id.* at 12. Even if this legislative concern might carry some residual weight in the area of contributions, *see id.* at 12 n.5, which enjoy only marginal First Amendment protection, it is plainly insufficient to intrude on advocacy group *expenditures*, which are protected by strict scrutiny.

[18] The NRA's *income* from sources other than individual contributions is *de minimis*. Although the NRA derives substantial *revenue* from advertising in its magazines and the sale of NRA memorabilia, it *loses* money on these activities. *See* J.A. 386-87. Additionally, the NRA generates rental income from leasing unused space in its building. Finally, the NRA receives negligible contributions from for-profit businesses. *See* J.A. 1963.

Nor is there any basis in this Court's jurisprudence for licensing the government to peer into the minds of the members of a grassroots issue advocacy group in order to ensure a perfect correspondence between their views and the group's political activities. Indeed, in *MCFL*, this Court recognized that a contribution to an advocacy group "necessarily involves at least some degree of delegation of authority to use such funds in a manner that best serves the shared political purposes of the organization and contributor," and that a member "dissatisfied with how funds are used can simply stop contributing." 479 U.S. at 261. This Court offered the same reasoning with respect to contributors to a PAC: "[C]ontributors obviously like the message they are hearing from these organizations and want to add their voices to that message; otherwise they would not part with their money." *NCPAC*, 470 U.S. at 495. And the same may be said with respect to the widely diverse membership of the political parties. *See Colorado Republican I*, 518 U.S. 604 (1996).[19]

### E. Requiring The NRA To Speak Through Its PAC Will Artificially Deflate Its Voice.

Although Defendants have posited that electioneering communications are regulated by Title II because they beget the grievous public harm of official corruption, they also paradoxically maintain that Title II bans no electioneering communications at all because corporations and unions remain free to speak through their PACs. As a measure designed to prevent official corruption, of either the *quid pro quo* or the "gratitude" variety, Title II therefore

[19] In any event, the record in this case confirms the strong support among NRA members for its speech: over 78 percent of the cost of airing its 30-minute broadcasts was paid for *by viewers* who signed up as new members. J.A. 1964. Under the FEC's regulations, the NRA's PAC would not be able to solicit funds in this manner from the general public.



makes no more sense than a bribery statute requiring corporations to pay for their bribes using funds from PACs. For that reason alone, "belief in the [statute's proffered anti-corruption] purpose [is] a challenge to the credulous." *Republican Party of Minnesota v. White*, 536 U.S. 765, 780 (2002) (quotation and citation omitted). Congress surely did not intend Title II to result in nothing more than an act of institutional ventriloquism, with organizations like the NRA simply throwing from the mouths of their PACs the very same "electioneering communications" that allegedly threaten to corrupt federal officeholders. Moreover, Defendants do not contend that a candidate is any less grateful for, and thus any less corrupted by, an issue ad aired with PAC money than an identical ad aired with an organization's general funds. And Defendants' own witnesses concede that the public's perception of ads is not affected in the slightest by whether they are purchased with general treasury funds or with PAC money.[20]

Title II's congressional supporters well understood that requiring the NRA to speak through its PAC will necessarily reduce the collective voice of its four million members to a whisper.[21] *See* S.A. 259 (Henderson) ("Political action committees cannot finance more than a small

[20] As Senator Simpson stated, drawing a distinction between the "appearance of corruption [depending upon] whether the ad is paid for by the NRA or whether it is paid for by the NRA's PAC" is like "dancing on the head of a pin," since "[t]here's no difference to the American public of who that is." J.A. 1022; *see also* J.A. 1023; J.A. 836; J.A. 1037.

[21] *See* LH App. 58a-62a (Sen. Wellstone) (referencing the NRA and Sierra Club as prototypical organizations whose ads should be restricted); LH App. 53a (Rep. Schakowsky) ("If my colleagues care about gun control, then campaign finance is their issue so that the NRA does not call the shots."); LH App. 52a (Rep. Pickering) (quoting Scott Harshberger, the President of Common Cause, who championed BCRA by saying: "'A vote for campaign finance reform is a vote against the second amendment gun lobby.'"); *see generally* LH App. 52a-57a.

fraction of the electioneering communications that corporations and unions have been able to fund from their treasury funds."). A battery of regulatory and practical hurdles precludes groups such as the NRA from using their PACs to make independent expenditures commensurate with public support for their political ideas.[22] The NRA's PAC, the PVF, is strictly barred from soliciting beyond the NRA's membership for contributions, and no portion of an NRA member's membership fees may be allocated to PVF. *See* 11 C.F.R. § 114.7; 11 C.F.R. § 114.1. As Judge Henderson explained, "While NRA PVF raised $17.5 million during the 2000 election cycle, the NRA received over $300 million in contributions from individuals during the same period. The disparity stems from the inability of NRA members – most of whom are individuals of modest means – to pay the NRA's membership fee and then contribute beyond that amount to NRA PVF." S.A. 259 (Henderson) (internal citations omitted). Title II thus effectively deprives millions of ordinary individuals of their ability to join collectively in making "electioneering communications" to support and preserve their freedoms under the Second Amendment.

Although some would justify restricting independent expenditures on political speech as necessary "to democratize the influence that money itself may bring to bear upon the electoral process," *Shrink*, 528 U.S. at 401 (Breyer, J., concurring with Ginsburg, J.), Title II stands that reasoning on its head. By requiring a group's political speech to be channeled through its PAC, Title II ensures that the voices of members of modest means will be silenced, closing the marketplace of political expression to all but the well-to-do.

For this reason, Title II works a similar inversion of the *Austin* Court's reasoning. Again, *Austin* upheld a limit on corporate independent expenditures as justified to

[22] *See* J.A. 377-78; J.A. 702; J.A. 112-13; J.A. 333; J.A. 1008-09.



prevent wealth generated in the economic marketplace from unfairly *inflating* the strength of the corporation's political voice beyond the "public's support for the corporation's political ideas." *Austin*, 494 U.S. at 660. The NRA's wealth, like that of typical advocacy groups, is attributable to its success in the political marketplace, not the economic marketplace, and its general treasury "accurately reflects members' support for the organization's political views." *Id.* at 666. By requiring the NRA's political speech to be channeled through the PVF, Title II *deflates* the strength of the organization's voice in the political marketplace vastly below its "contributors' support for the corporations' political views." *Id.* at 660-61. Thus, far from ensuring that "resources amassed in the economic marketplace [are not] used to provide an unfair advantage in the political marketplace," *MCFL*, 479 U.S. at 257, Title II ensures that resources amassed in the political marketplace cannot be put to use in the very place from whence they came.

Finally, most of the NRA's "electioneering communications" have nothing to do with getting candidates elected; instead, they serve to educate Americans about political developments that bear upon the Second Amendment, to defend the NRA against direct attacks by the media and politicians, and to generate membership and raise funds. *See supra* at 2; *infra* at 35-41. The exclusive mission of PVF, however, is "to influence the outcome of federal elections. That is the sole purpose for which donors contribute to the Political Victory Fund." J.A. 377. Indeed, PVF is the sole means through which NRA members can engage in "express advocacy" speech exhorting the public to "vote for" or "against" specific candidates – and PVF devotes its precious resources to funding precisely such speech. Forcing the PVF now to fund the NRA's "electioneering communications" would necessarily result in a tradeoff with the express advocacy it currently funds, further abridging core political speech at the heart of the First Amendment.

## III. THE WELLSTONE AMENDMENT'S SUPPRESSION OF POLITICAL SPEECH FUNDED EXCLUSIVELY WITH INDIVIDUAL CONTRIBUTIONS IS UNCONSTITUTIONAL.

Even if one credits at face value Defendants' claim that the specter of *Austin*-type corruption extends to the independent electioneering expenditures of nonprofit advocacy groups, Title II must fall. Congress had before it a less restrictive means to ensure that the political voices of advocacy groups like the NRA were not unfairly inflated by corporate wealth generated in the economic marketplace.

As originally proposed by Senators Snowe and Jeffords, Section 203(b) of Title II would have exempted 501(c)(4) membership organizations from the ban on funding electioneering communications, so long as the organizations used funds that were derived solely from individual contributions and were maintained in an account segregated from any corporate contributions. Thus, Section 203(b) of Snowe-Jeffords was designed to ensure that such an advocacy organization's political message reflected its popular support in the political marketplace. Conversely, by banning electioneering expenditures of business corporations and their 501(c)(6) trade associations, the original Snowe-Jeffords proposal wholly eliminated the threat, identified in *Austin*, that such corporations might use wealth generated in the economic marketplace to unfairly distort the political arena with electioneering communications having "little or no correlation to the public's support for the corporation's political ideas." 494 U.S. at 660-61. Snowe Jeffords thus sought to steer a safe course between this Court's decisions in *MCFL*, on the one hand, and *Austin*, on the other.

The Wellstone Amendment, Section 204, effectively nullifies Section 203(b) of Snowe-Jeffords. Aimed specifically at the NRA, Sierra Club, and similar advocacy groups, *see* LH App. 58a-62a (Sen. Wellstone), the Wellstone Amendment was designed to prevent *individuals* from combining their voices with others of like mind



"in organizations which serve to '[amplify] the voice of their adherents.'" *NCPAC*, 470 U.S. at 494 (quoting *Buckley*, 424 U.S. at 22 (alteration in original)).[23] The Wellstone Amendment thus runs directly contrary to this Court's consistent First Amendment teaching: "To say that [individuals'] collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources." *Id.* at 495.

Fully grasping that the Wellstone Amendment was "susceptible to a constitutional challenge," LH App. 58a (Sen. Feingold), BCRA's sponsors opposed the measure. But opponents of BCRA rallied behind it (presumably for the same reason), and it was passed. To ensure that it would not doom Title II as a whole, however, BCRA's sponsors made sure that the Wellstone Amendment, in the District Court's words, could be "cleanly struck from the law."[24] As Senator Feingold explained:

> I voted against adding th[e Wellstone] amendment. I thought and still think that it makes

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[23] *See* LH App. 65a (Sen. Wellstone) ("individuals with all of this wealth" will "make their soft money contributions to these sham issue ads run by all of these . . . organizations, which under this loophole can operate with impunity" to run "poisonous ads"); LH App. 66a-67a (noting that only .002% of Americans donate more than $10,000 to candidates, and explaining, "I have an amendment that tries to make sure . . . this big money doesn't get" through).

[24] "The Wellstone Amendment was codified in a separate section of BCRA in order to preserve severability: hence, if the Court finds the inclusion of section 501(c)(4) organizations and section 527 within the ban on electioneering communications to be unconstitutional, the Wellstone Amendment can be cleanly struck from the law and the original Snowe-Jeffords exception for these groups will be restored." S.A. 65-66 (Per Curiam).

> Snowe-Jeffords more susceptible to a constitutional challenge, but it passed when many Senators who oppose the bill and the Snowe-Jeffords provision voted for it. In any event, the Wellstone amendment was written to be severable from the remainder of the Snowe-Jeffords provision. That gives even more significance to the vote we will have today on severability. But if we win that vote, Snowe-Jeffords will survive even if the Wellstone amendment is held to be unconstitutional.

LH App. 58a (Sen. Feingold).[25] The Wellstone Amendment, from its inception, was thus specifically designed to be a disposable part of Title II, destined for extinction upon completion of this Court's review.[26]

In the District Court, the Government – while taking pains to emphasize that the unconstitutionality of the Wellstone Amendment "provides no basis for striking down

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[25] *See also* LH App. 63a (Sen. Edwards) ("[T]he reason Senator Feingold and Senator McCain are opposing th[e Wellstone] amendment is the same reason that I oppose this amendment: It raises very serious constitutional problems"); LH App. 62a (Sen. Wellstone) ("I have drafted this amendment to be fully severable. In other words, no one can suggest that even if the court finds this amendment unconstitutional, it would drag down the rest of this bill or even jeopardize the other provisions of Snowe-Jeffords."); LH App. 58a-64a.

[26] Judge Henderson acknowledged the patent unconstitutionality of the Wellstone Amendment. *See* S.A. 368-70 (Henderson). Judge Kollar-Kotelly left the Wellstone Amendment undisturbed without purporting to analyze whether Section 203(b) of Snowe-Jeffords constituted a less restrictive alternative. *See* S.A. 869-71 (Kollar-Kotelly). Judge Leon likewise upheld the Wellstone Amendment; he thought it justified by the prospect that "for profit-corporations and unions [might] funnel their general treasury funds through nonprofit corporations in order to purchase electioneering communications." In doing so, he thus overlooked that this prospect is *wholly foreclosed* by Section 203(b) of Snowe-Jeffords, which restricts electioneering funding to *individual* contributions. S.A. 1168-69 (Leon).



BCRA's electioneering communications provisions *in toto*" – characterized the Amendment as intended to "prevent large soft-money donations from *individuals* (*i.e.*, those exceeding the hard money contributions to political parties) from being passed through nonprofit corporations to purchase electioneering ads." Gov't Reply Br. 58-59 (filed Nov. 27, 2002) (emphasis added). That simply reformulates the amendment's impermissible intent: the First Amendment flatly forbids Congress from regulating the political expenditures, as opposed to the contributions, of individuals, *Buckley* 424 U.S. at 48-49, and Congress can claim no valid interest in preventing circumvention of a nonexistent expenditure limit that it lacks power to create.[27]

Even if Congress *could* regulate individual expenditures in this fashion, the less restrictive (and thus constitutionally required) means of doing so would be to prevent 501(c)(4) corporations from funding "electioneering communications" with individual donations *in excess* of existing contribution limits – *not* to impose the Wellstone Amendment's flat prohibition. Had Congress taken this less restrictive approach, organizations like the NRA, whose average donation totals $30, could sustain their political voices without reliance upon "large soft-money donations from individuals" that supposedly justified the amendment.

Nor can Defendants save the Wellstone Amendment by recasting it as concerned with the "fungibility" of money, *i.e.*, the marginal prospect that nonprofit groups might otherwise use corporate contributions to offset their

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[27] Unlike PACs and political parties that may make *contributions* to candidates, the 501(c)(4) corporations regulated by the Wellstone Amendment are categorically prohibited from doing so. *See, e.g., FEC v. Beaumont*, 123 S. Ct. 2200, slip op. at 9-10 (June 16, 2003). Accordingly, the Government cannot defend the amendment as merely "a corollary of the basic individual contribution limitation" upheld in *Buckley*. 424 U.S. at 38; *see California Med. Ass'n v. FEC*, 453 U.S. 182, 198-99 (1981).

expenses, thereby freeing up individual contributions to fund "electioneering communications." That phenomenon is an independent feature of existing campaign finance law, as corporations remain free under BCRA to fund the administrative and operating expenses of their PACs out of general treasury funds. *See* 11 C.F.R. § 114.5(b). Moreover, this Court's teaching is simply that Congress may require a corporation's expenditures to bear a meaningful "correlation," *Austin*, 494 U.S. at 660, or to constitute a "rough barometer" of the public's support for its political views. *MCFL*, 479 U.S. at 258. Surely the original Snowe-Jeffords approach, by confining electioneering expenditures of nonprofit advocacy organizations to the amount of their individual contributions, fully implements that teaching. And the Wellstone Amendment, by preventing such organizations from engaging in "electioneering communications" for fear that a single corporate dollar might otherwise lend indirect assistance, just as surely flouts it.

Finally, the Intervenors attempted below to justify the Wellstone Amendment on the ground that the "electioneering communications" of 501(c)(4) corporations might unduly diverge from the views of their individual donors. But there is nothing in the legislative record of Title II suggesting that Congress shared this concern. Nor is there evidence in the legislative record, or even in the litigation record developed in this case, that 501(c)(4) corporations tend to make independent expenditures at odds with the shared views of their donors. To the contrary, the realities of the political marketplace ensure that a *voluntary membership* organization dependent on member *donations* will rarely, if ever, stray significantly from the common ideals that bind the membership. *See NCPAC*, 470 U.S. at 495 ("[C]ontributors obviously like the message they are hearing from these organizations and want to add their voices to that message; otherwise they would not part with



their money."). Here, there is no doubt that the "electioneering communications" of the NRA enjoy the widespread support of its membership.[28]

In any event, as previously discussed, *supra* at 23-24, this Court has never suggested that a perfect correspondence between an advocacy organization's electioneering communications and the views of all of its members is a necessary predicate for First Amendment protection against regulation of the organization's political speech. *See MCFL*, 479 U.S. at 261 ("individuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction" and "delegat[e] authority to use such funds in a manner that best serves the shared political purposes of the organization and contributor").

## IV. TITLE II IS FATALLY OVERBROAD.

Title II's prohibition on electioneering communications is fatally overbroad both because it silences *speakers* that pose no threat of the harms allegedly sought to be prevented and because it criminalizes *categories of speech* that are wholly divorced from the statute's purposes. "The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002).

*Ashcroft* struck down the Child Pornography Prevention Act as overbroad on the basis of *hypothesized* applications of the law. *See id.* at 258; *id.* at 273 (Rehnquist, C.J., dissenting). Here, by contrast, there is *compelling evidence*

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[28] Conversely, there is no indication that the independent political expenditures of either PACs or political parties, which remain free to fund "electioneering communications," accord with their donors' wishes any more consistently than do those of advocacy groups like the NRA.

that the NRA is a speaker whose conduct does not implicate the statute's purpose and whose speech falls outside the ambit of the restriction's purported rationale.

### A. Title II Criminalizes the Speech of Organizations that Pose No Threat of Corrupting the Political Process.

By restricting the electioneering speech of grassroots advocacy organizations, Title II frustrates the central purpose of such entities: to allow "large numbers of individuals of modest means [to] join together in organizations which serve to '[amplify] the voice of their adherents.'" *NCPAC*, 470 U.S. at 494 (quoting *Buckley*, 424 U.S. at 22) (alteration in original). The aggregated contributions of the members of such an organization correspond with the members' support for its political ideas. The NRA's voice can be heard in the halls of Congress and state legislatures precisely because it is the *collective voice* of millions of Americans speaking in unison. That "is not a *corruption* of the democratic political process; it *is* the democratic political process." *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting) (emphases in original). And if a group of individuals organized in the corporate form and united by their common devotion to the protection of their Second Amendment rights can be prosecuted for speaking the names of political candidates who pose a threat to those rights, then the First Amendment has become a "promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards v. California*, 314 U.S. 160, 186 (1941).

Title II contains no exception for any nonmedia corporate entities. Indeed, even MCFL itself is barred from making electioneering expenditures.[29] This failure alone

[29] Judge Kollar-Kotelly elided this defect by effectively reading an *MCFL* exemption into the statute, although no such exemption was "expressly provided for." S.A. 870 (Kollar-Kotelly). Judge Leon, in

(Continued on following page)



dooms the statute because there are numerous *MCFL* entities that engage in speech that will be criminalized. *See* S.A. 251 ¶45b (Henderson); 11 PCS/NRA 157-95; 11 PCS/NRA 196; J.A. 1957-58; J.A. 1959-61.[30]

### B. Title II Criminalizes Speech That Is Not Intended To Influence Elections.

Title II's restriction on electioneering communications also fails the narrow tailoring standard because it unfairly criminalizes *numerous categories of speech* that are not intended to, and will not have the effect of, influencing federal elections. The NRA's extensive independent expenditures on television and radio broadcasting are designed to serve three principal purposes: (1) to educate the public

contrast, held Title II "unconstitutional only in its application to *MCFL*, nonprofit corporations." S.A. 1169 (Leon). Both thereby erred in failing to analyze the statute, on its face, in accordance with its dispositive terms: The Wellstone Amendment specifically seeks to regulate nonprofit corporations' use of individual donations and to do so without qualification; and that express, unambiguous prescription by Congress is insusceptible to judicial modification short of outright invalidation. *See, e.g., Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 220 (1998).

[30] Although the FEC's regulations provide relief for a limited subset of "qualified nonprofit corporations," its procrustean criteria create an exception so narrow that it conflicts with the Court's decisions in *MCFL* and *Austin* and, in any event, does not cure the overbreadth that infects this statute. 11 C.F.R. § 114.10(c). "The rigidity with which the FEC [implements] *MCFL* would impoverish political debate." *FEC v. Survival Education Fund, Inc.*, 65 F.3d 285, 292 (2d Cir. 1995); *see Minnesota Citizens Concerned for Life ("MCCL") v. FEC*, 113 F.3d 129, 130-31 (8th Cir. 1997) (affirming that relevant FEC regulations "are constitutionally infirm . . . because they deny the *MCFL* exemption to a voluntary political association that conducts minor business activities or accepts insignificant corporate donations"); *MCCL v. FEC*, 936 F. Supp. 633, 643 (D. Minn. 1996), *aff'd*, 113 F.3d 129 (8th Cir. 1997) (further suggesting unconstitutionality of FEC requirements that organization's "only" purpose be promotion of political ideas and that members not obtain "any" benefit that might discourage disassociation).

about Second Amendment and related firearm issues, including pending legislative initiatives; (2) to defend itself against attacks aired by the broadcast media, including attacks by politicians opposed to the NRA's views on the Second Amendment and related issues; and (3) to recruit members and raise funds. When engaging in such speech, the NRA often makes references to public officials and candidates for federal office. *See* S.A. 256 ¶51 (Henderson). The vast majority of this speech is not intended to influence elections, *see* S.A. 858-59 (Kollar-Kotelly), and BCRA's criminalization of this speech demonstrates the statute's dramatic overbreadth.

1. Broadcasts that urge viewers and listeners to oppose or support pending legislation do not implicate the concerns that allegedly animate Title II. Just as this Court has recognized that speech pertaining to referenda does not raise a substantial concern about corruption, so too speech urging the passage or defeat of pending legislation does not carry any threat of corrupting the political process. *See Bellotti*, 435 U.S. at 790 ("The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue.") (internal citation omitted). Even BCRA's sponsors proposed to the FEC a regulatory exception to allow "entities concerned about legislation to run true issue ads with a legislative objective and a request to contact an elected official during the 30 or 60 day windows." *See* J.A. 1967-68. Senator Jeffords has acknowledged that "there's nothing wrong with" a membership organization running an ad urging Senators to vote on legislation affecting its members. *See* 11 PCS/NRA 88. But, of course, the Wellstone Amendment and the FEC regulations now criminalize such speech.

For example, the NRA ran a series of TV ads criticizing the so-called Brady Bill and urging viewers to call their congressional representatives in support of an alternative legislative proposal. *See* J.A. 2005; 12 PCS/NRA A (video). These ads fall within even the Intervenors' conception of a "true issue ad," though BCRA now



criminalizes them. Likewise, in 1994 the NRA ran a series of broadcast ads in opposition to President Clinton's Crime Bill. The broadcasts urged viewers to "Call your congressman" to oppose passage of the bill. *See* J.A. 2006-09; 12 PCS/NRA A (video). All of these messages were quintessential political speech that was not intended to influence an election, regardless of when the ads might have been broadcast. The references to federal officeholders were necessary to urge Second Amendment supporters to pressure their representatives to defend this freedom.

The NRA also airs general educational programming to offset the mainstream media's biased coverage of news relating to Second Amendment rights. In response to a virtual blackout on coverage of issues important to the NRA and its members, the NRA in 2000 ran a series of in-depth, half-hour broadcasts modeled on TV news magazines such as *60 Minutes*. *See* J.A. 366-67; S.A. 256-58 ¶51 (Henderson). The topics included: gun registration and confiscation in England, Australia, and Canada; the impact of the Clinton administration's failure to pursue vigorous prosecution of existing gun laws; the identities and hypocrisy of the sponsors of the "Million Mom March"; and an analysis of Vice President Gore's position on the Second Amendment. *See* J.A. 367-70; J.A. 379-83; S.A. 751-52 ¶2.11.4.4 & n.103 (Kollar-Kotelly). These broadcasts ran over 11,000 times at an expense of more than $13 million, and were aired both on national cable channels and in targeted markets in virtually every state in the Union. *See* J.A. 367; J.A. 1965.

One such NRA broadcast covered the mounting efforts to restrict private ownership of firearms in California. *See* J.A. 2010-33; 12 PCS/NRA D (video). During the 30-minute program, a poster bearing a likeness of President Clinton and the words "TWO YEARS LEFT TO GET YOUR GUNS" appeared while the reporter stated that California's legislation banning semi-automatic weapons was "[t]he first in the country and the model use[d for] the 1994 Clinton-Gore assault weapons ban." J.A. 2011. This

single reference to Mr. Gore would have sufficed to trigger BCRA's criminal penalties for each of the more than 800 airings that occurred in California alone between August 29, 2000 and November 5, 2000. *See* J.A. 1966. None of these airings was intended to influence a federal election. J.A. 368. Indeed, in California the outcome of the 2000 presidential election was never in serious doubt, and the NRA would not have wasted its scarce resources on such a contest if influencing the election had been its objective.[31]

2. As Judge Henderson found, "the NRA's frequent references to candidates for federal office in the programming it broadcasts throughout the election cycle . . . enable the NRA to respond directly and effectively to frequent criticism by politicians and the media." S.A. 256-57 ¶51 (Henderson). For example, on March 2, 2000, President Clinton appeared on NBC's Today Show. During the 15-minute interview, he pointedly criticized the NRA and made several erroneous statements, including that the NRA is "against anything that requires anybody to do anything as a member of society that helps to make it safer." *See* J.A. 2034-45; 12 PCS/NRA C (video), S.A. 258 (Henderson).

In order to get its side of the story out, the NRA developed and aired a series of thirteen 30- and 60-second ads featuring the organization's President, Charlton Heston. *See* 12 PCS/NRA 914-16; 12 PCS/NRA B (video). Critical to framing an effective response was the NRA's

[31] The NRA also aired a broadcast in 2000 entitled "It Can't Happen Here." *See* J.A. 2046-69; 12 PCS/NRA E (video). This program was substantially similar to the "California" program and was run throughout the United States from August through October of 2000. *See* 11 PCS/NRA 217-20. Although Vice President Gore's image on the cover of the NRA's magazine appeared three times on the screen during this 30-minute broadcast and a single reference was made to the Clinton-Gore administration, this program was not intended to influence a federal election in any way. *See* J.A. 2047, 2052-53, 2060, 2068; J.A. 368; S.A. 257 ¶51b (Henderson).



ability to refute specific statements made by President Clinton and to refer to him by name. *See* S.A. 258 (Henderson). The NRA designed the ad campaign to elevate the controversy to such a degree that NRA representatives would be invited onto national media outlets and would thus gain a forum to defend the NRA before a national audience. J.A. 417-19; S.A. 258-59 (Henderson). The media strategy succeeded, and NRA representatives were invited to appear on several nationwide news shows. Without access to paid media and without the ability to refer to President Clinton by name, the NRA would not have been able to gain access to the national television audience that had heard President Clinton's statements. *See* S.A. 258-59 (Henderson); J.A. 416-21. Although the NRA's ads would not have been prohibited by Title II because President Clinton was not running for reelection, they illustrate the critical role that paid programming plays in allowing the NRA to defend itself.

Some politicians also use their campaign ads to attack the NRA by name. There are dozens of recent examples of such ads. *See* Storyboards of Ads Attacking NRA (Supplemental Submission on CD); 11 PCS/NRA 223-25, J.A. 1961-81, 11 PCS/NRA 233-44.[32] But BCRA would limit the NRA's ability to defend itself by responding directly to its attackers through the same medium.

[32] Just this past election cycle, for example, Mark Shriver, a candidate in the Democratic primary for the 8th congressional district in Maryland, and his opponent, Chris Van Hollen, attacked the NRA in a series of TV ads. *See* J.A. 1969-76. The most egregious attack was run by Mr. Shriver:

> I . . . defeated a piece of legislation backed by the NRA that would have allowed convicted felons to own handguns. That's bad public policy. We shouldn't allow people who are convicted of domestic violence to own a handgun. . . . I welcome the fight from the NRA. Nothing would give me more pleasure than defeating the NRA.

J.A. 1969-70.

The NRA's paid broadcasts also allow it to defend against and rebut biased media reporting. *See* J.A. 378-79. The media's coverage of the Million Mom March is illustrative. In the spring of 2000, the sponsors of that event worked closely with the Clinton White House and were able to gain enormous exposure (through free national media coverage) for their attacks on the NRA. *See* J.A. 379-80. In response, the NRA aired a 30-minute paid program that examined the forces and influences behind the Million Mom March. *See id.*; *see also* J.A. 2070-85; 12 PCS/NRA F (video). The program criticized celebrities and politicians (such as Senator Feinstein) for advocating confiscation of handguns from ordinary citizens while ensuring that they (or their personal bodyguards) retain their guns. *See* J.A. 2071-73. The program also included a short statement from Senator Orrin Hatch criticizing anti-gun celebrities. *See* J.A. 2072-73, 12 PCS/NRA 939; S.A. 257 ¶51c (Henderson). Additionally, during a solicitation for new members, the program showed a cover of the NRA's magazine FIRST FREEDOM reading "Clinton to the Gore" and depicting President Clinton morphing into Vice President Gore. J.A. 2077, 2084, 12 PCS/NRA 942. The program also stated that "President Clinton, Hillary [Clinton, then a candidate for the Senate], [and] Schumer" were at the Million Mom March "for their own political gain," J.A. 2076; and another segment chastised the "Clinton-Gore White House" for having "turned its back on real justice" by allowing the number of federal firearm prosecutions to drop by 44 percent between 1992 and 1998. J.A. 2083.

This news magazine was broadcast throughout the country from July to November 2000. For two months prior to the 2000 election, all of the airings nationwide would have been prohibited under BCRA because of two references to the "Clinton/Gore" administration's record on prosecution of federal firearms laws and the depiction of a magazine cover. The program aired dozens of times in California in the 60 days prior to Senator Feinstein's reelection. *See* S.A. 257 ¶51c (Henderson); 11 PCS/NRA 245-48. It also aired in New York in the 30 days prior to Senator Clinton's primary race for the Democratic



nomination for Senate, 11 PCS/NRA 249, 251, and in Utah in the 60 days prior to Senator Hatch's reelection. Supp. App./NRA 973. But in defending itself against the attacks launched at the Million Mom March, the NRA had no intention of influencing a federal election. *See* J.A. 380. Indeed, Senator Clinton's primary election and Senators Hatch's and Feinstein's general elections were not competitive, and the ad ran heavily in states that Mr. Gore had no chance of winning.

3. The NRA also broadcasts programs that are designed to increase its membership and to raise funds. An integral part of such speech is identifying the threats posed to Second Amendment rights by anti-gun politicians. In making fundraising appeals, the NRA has repeatedly referred to Senators Schumer, Feinstein, and Clinton, as well as to President Clinton and Vice President Gore, and criticized their positions on Second Amendment rights. *See, e.g.*, J.A. 1950-56, 11 PCS/NRA 137-56. These fundraising activities are not designed to influence federal elections. Rather, they are targeted at communities that the NRA believes are concerned about preserving the Second Amendment and already have very negative impressions of the federal officeholders named in the fundraising appeals.[33]

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[33] For example, the NRA aired a "Tribute" to Charlton Heston throughout the country from June through September 2000. J.A. 384. The program contained several references to then-Vice President Gore. J.A. 2088, 2095; *see* S.A. 752 n.104 (Kollar-Kotelly). Despite these limited references, the program was not intended to influence the outcome of a federal election. J.A. 384-85. Indeed, when the ad was run within the 60 days prior to the election, it aired in markets such as Dallas, Texas, and Los Angeles, California, where the outcome of the presidential election was not in doubt. 11 PCS/NRA 252, 253. Additionally, during the appeals for new members, Senator Feinstein's name was briefly mentioned in text at the bottom of the screen in a ticker format. J.A. 2091 ("National gun registration plan from Sen. Dianne Feinstein – Campaign Centers on Gun Photo ID's."). Again, although this program ran in September of 2000 in California, it was not intended to influence Senator Feinstein's reelection contest, which was not competitive. *See* J.A. 384-85. Similarly, the NRA in 1999 aired

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4. As the foregoing reflects, in the year 2000 alone, the NRA aired issue advocacy on hundreds, if not thousands, of occasions when it had no intent to influence a federal election but nonetheless would face criminal penalties under BCRA. Title II, accordingly, must fall, for the criminalization of "a large amount of speech" that is protected under the First Amendment demonstrates that the statute is fatally overbroad. *Reno v. ACLU*, 521 U.S. 844, 874 (1997). And even if the Court rests its overbreadth analysis on the *percentage* of "innocent" political speech that is prohibited by Title II, the NRA's speech alone demonstrates the palpable flaws in the *Buying Time 2000* study relied upon by Congress and Defendants to justify the speech restriction.

By design, the study excluded all of the 330,000 minutes of the NRA's speech that took the form of half-hour news magazines, for the study considered only ads that lasted less than two minutes on television. Indeed, the amount of NRA speech neglected by the study is, in terms of total airtime, more than twice that which its authors considered. *See* J.A. 1171-73 (interest groups ran 133,335 political ads in 2000). As explained above, most of the NRA's infomercials, including those that referenced candidates, were devoted solely to issue advocacy and were not intended to influence an election. When the documented airings of the NRA's broadcast are added to the proper numerator and denominators identified in the McConnell Plaintiffs' brief, Title II is shown to be at least 34 percent overbroad and thus plainly constitutionally invalid. *See* S.A. 257-58 ¶51d (Henderson).[34]

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"Banned In Canada," which warned viewers that "powerful people like Senator Charles Schumer, the most anti-gun politician in history, have a very different future in mind for you"; no election was looming at the time, and Senator Schumer himself was not up for election until 2004. *See* Supp. App./NRA 987, 999.

[34] *Both* Judges Kollar-Kotelly and Leon inexplicably stated that the NRA had not established how its news magazines would have affected

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Title II will also have a chilling effect because it creates a practical nightmare for national issue advocacy groups that wish to continue to engage in political discourse without running afoul of the statute's criminal sanctions. In 2004, such groups will have to censor their broadcasts in no fewer than 1,505 markets at varying times.[35] And there will be thousands of candidates whose names must be cleansed from broadcasts reaching the relevant markets. *See* 11 PCS/NRA 118-19 (indicating that there were 2,100 candidates for the House and Senate in 1998). In attempting to comply with Title II, the NRA must first identify the precise time that each primary occurs for all political parties in each state, and the names of each and every candidate for federal office. The resulting database will have to be constantly updated to reflect candidates dropping in and out of all the races. The NRA will then have to cross-check its speech for any reference to any candidate within the proscribed markets and times. Even the Defendants' own experts concede that "[t]he hodgepodge of different primary dates makes it difficult" to identify speech that is covered by Title II. *See* J.A. 1343.[36]

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the results of *Buying Time*. S.A. 1072-73 (Kollar-Kotelly); S.A. 1355-56 (Leon). But the details of the calculation upon which Judge Henderson relied were set forth in the NRA's Reply Br. below at 24-25 & n.21 (citing J.A. 1966, Supp. App./NRA 1005-49).

[35] In 2004, there will be as many as 870 primaries for the House of Representatives (a Republican and Democratic primary for each House race), 66 primaries for Senate races, 100 primaries for the Republican and Democratic nominations for the presidency, 435 general elections for the House, 33 Senate general elections, and one general presidential election. These calculations exclude, of course, the primaries for third party candidates and thus represent a conservative estimate of the number of races that will trigger BCRA's requirements.

[36] It will be especially onerous for the NRA to purge references to candidates for federal office from its 30-minute news magazines. Much of this programming is devoted to unscripted interviews with ordinary citizens. The NRA will have to transcribe these interviews so that it can compile the names of all those who are referenced during the program.

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## V. TITLE II UNCONSTITUTIONALLY DISCRIMINATES IN FAVOR OF MEDIA CORPORATIONS.

Title II's restriction of "electioneering communications" does not extend to any "communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcast station." BCRA §201(a). During the period when all other corporations are muzzled, media companies may air as many of *their own* electioneering communications as they wish. Unlike other corporations, they can endorse candidates for election and name candidates while editorializing on particular issues. But Title II's media exception does more than give the broadcast companies a special license to discuss candidates for federal office.

By banning advocacy groups from buying their own advertising time, Title II puts those broadcasters in the position of being able to grant (or deny) speech licenses to advocacy groups whose only remaining hope for air time is to be chosen by a broadcaster for inclusion on one of its programs. This reinforces the station owners' "unfettered power . . . to communicate only their own views on public issues, . . . and to permit on the air only those with whom

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Additionally, some of the interviews contain references to officeholders, such as the attorney general of a particular state, without including his name. *See, e.g.*, J.A. 2050 ("And when gun owners call ATF directly or the California Attorney General's Office, they can't get a straight answer from them either."). The NRA will have to identify each unnamed officeholder given that Title II covers references to specific offices. *See* 11 C.F.R. § 100.29(b)(2). Many of the NRA's programs include footage of protests against anti-gun measures, so the NRA will have to scan and transcribe the text of all the placards carried by the protesters to ensure that none contains the name of a candidate or references a specific office. And the NRA will face the task of making sure that the candidates themselves do not appear in these protests or any of its news footage. Once all of these names have been compiled, then the NRA must then match them against the database of candidates for federal office. The complexity of this process will severely chill the NRA's speech.



they agree[ ]." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 392 (1969); *see also FCC v. League of Women Voters*, 468 U.S. 364, 398 (1984). An eighteenth century British colonial censor armed only with the Stamp Act would salivate at the prospect of wielding the speech-licensing power that Title II confers on the broadcast media.

The public debate in the weeks preceding an election will now be heavily skewed by Title II to those viewpoints that the broadcast media, as super-gatekeepers, judge to be worthy of consideration. During future elections, the NRA will be limited to its PAC funds in broadcasting any communication that even refers to a candidate; by contrast, General Electric, for example, will be free to broadcast criticism or praise of candidates at will. Indeed, a multinational conglomerate that happens to own a TV network and cable channels, Rupert Murdoch's News Corporation, can use its general treasury funds to produce a weekly hour-long program ("American Candidate") that effectively launches its very own political candidate, *see* J.A. 1982-86, 11 PCS/NRA 346-47, while the NRA – funded by millions of regular Americans with annual dues of $30 each – would commit a federal crime if it purchased a 30-second commercial spot during that program that so much as *referred* to that candidate.

This is unconstitutional. This Court has rejected the proposition that "communication by corporate members of the institutional press is entitled to greater protection than the same communication by [non-media companies]." *Bellotti*, 435 U.S. at 783 n.18; *see also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 784 (1985). The First Amendment does not enshrine the press, *for its own sake*, as a favored institution *apart* from the public. There is no favored Fourth Estate here, any more than there is a First Estate (the clergy) or a Second Estate (the aristocracy). The rights of the media are *derivative of the rights of the people*. The press is protected only because it "serves . . . as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve." *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

The Equal Protection Clause prohibits the Government from discriminating between classes of speakers without a compelling governmental purpose. *See Austin*, 494 U.S. at 667. In *Austin*, this Court confirmed that a law exempting media companies from a regulation of political speech triggers strict scrutiny, but concluded that there was a compelling governmental purpose for this discrimination: the "unique role that the press plays in 'informing and educating the public, offering criticism, and providing a forum for discussion and debate.'" *Id.* at 667 (quoting *Bellotti*, 435 U.S. at 781). The Court found that "media corporations differ significantly from other corporations in that their resources are devoted to the collection of information and its dissemination to the public." *Id.*

*Austin* cannot save Title II's media exception because the uncontested evidence in the record demonstrates that *Austin*'s factual predicates no longer exist. The creation and proliferation of the Internet has permanently transformed "the collection of information and its dissemination to the public," and the absorption of media companies into multinational conglomerates negates any notion that media companies are either "unique" or immune from the corruption-related concerns that are claimed to be the driving force behind BCRA.

Under strict scrutiny, the Government may not simply "posit" the existence of a compelling governmental interest, but must "demonstrate" that interest through the presentation of substantial evidence. *Turner*, 520 U.S. at 191; *see United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816-19 (2000). And this Court has recently recognized that the existence of the extraordinary facts needed to satisfy strict scrutiny at one time does not necessarily mean that those facts will continue to exist to justify a similar law in the future. *See generally Grutter v. Bollinger*, No. 02-241, slip op. at 31 (U.S. June 23, 2003). Given that 13 years have passed since the *Austin* Court upheld a state law favoring the political speech of media companies over that of nonmedia companies, the NRA's challenge to Title II's media exemption obligated the



Government to present *evidence* demonstrating why that discrimination satisfies strict scrutiny.

Despite this burden, the Government presented *no evidence* to the trial court that might justify Title II's discrimination in favor of media companies, choosing instead to rely solely upon *Austin*. The majority below followed suit. *See* S.A. 883-84 (Kollar-Kotelly). But while it rejected the NRA's argument, the District Court did not (and could not) reject the *uncontested* facts that persuaded Judge Henderson that "[t]he media industry is no longer 'unique' in the way that it was 10 or 15 years ago." S.A. 273 ¶54(a)(5) (Henderson). Neither Judge Kollar-Kotelly nor Judge Leon found any facts that contradict Judge Henderson's core factual finding.[37]

When the factual record in *Austin* closed in 1986, the internet was essentially nonexistent. Now, as Judge Henderson found, "[m]ore than 168 million Americans, or 60 percent of the general public, use the internet," meaning that "[m]ore Americans use the internet than read a daily newspaper." S.A. 272-73 ¶54(a)(3)(A) (Henderson). Judge Henderson also found that as "a source of news and information, the internet rivals and is displacing the broadcast media," that the "rapid growth in internet usage

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[37] Judge Kollar-Kotelly rejected the contention that Internet advertisements are "comparable to those broadcast over TV and radio in terms of their public reach and impact," S.A. 739-41 ¶¶2.10.3, 2.10.4 (Kollar-Kotelly), because Internet viewers "make a choice to go to the website and download or watch the program, while advertisements on television and radio are aired throughout programming without any viewer choice." S.A. 739-40 ¶2.10.3.1 (Kollar-Kotelly). Judge Henderson certainly did not find this distinction relevant, *see* S.A. 272-73 ¶54a(3) (Henderson), nor did Judge Leon endorse it. More importantly, neither Judge Kollar-Kotelly nor Judge Leon rejected any of the specific facts related to the proliferation of Internet usage found by Judge Henderson, and therefore did not (and could not) reject the proposition that the Internet has dramatically changed the "collection of information and its dissemination" since the time *Austin* was decided.

is one of the reasons for the dramatic decline in broadcast news program viewing," and that "[n]umerous websites provide an alternative source of daily news and challenge the market dominance previously enjoyed by the traditional media." S.A. 274 ¶54(a)(3)(B) (Henderson). In particular, "[t]he internet has also become an increasingly popular source of political news during election periods." *Id.*

Based upon the undisputed evidence, Judge Henderson concluded that "[o]ver the past decade the role of the traditional media in informing and educating the public has been profoundly altered by the emergence of the internet," to the point of negating the factual premise of *Austin* that traditional broadcast companies play a "unique role" in disseminating information and offering a forum for debate. S.A. 272-73 ¶54(a)(5)(A) (Henderson). Neither Judge Leon nor Judge Kollar-Kotelly rejected these critical facts.

Judge Henderson also found a second changed circumstance. While *Austin* relied on the assumption that media corporations were different because "their resources are devoted to the collection of information and its dissemination to the public," 494 U.S. at 667, Judge Henderson found that "many media entities have been subsumed within larger corporate conglomerates and have devoted their resources to bottom-line profits."[38] Why should the speech rights of such corporate behemoths as General Electric and Disney be greater than the rights of nonprofit,

[38] As Judge Henderson noted, "CBS has been acquired twice in the past decade, first by Westinghouse and then by Viacom, and is now a subsidiary of a conglomerate that runs oil companies, farms, theme parks, and mining companies." Likewise, ABC is now part of the Walt Disney Corporation, NBC is owned by General Electric, and Fox Television is part of Rupert Murdoch's global News Corporation empire, which owns transportation companies and sports teams." S.A. 274 ¶54a(5)(B) (Henderson). Additionally, AOL TimeWarner owns CNN, and Microsoft is a co-owner of MSNBC.



grassroots advocacy organizations like the NRA? Surely a multi-billion dollar multinational conglomerate is not vaulted into a "unique role" in our society the moment it decides to absorb a television station into its panoply of diverse business assets. Title II thus stands for the perverse proposition that it is wrong to use corporate money to pay for a discrete amount of broadcast time to air electioneering communications, *unless* the amount of money used is so enormously large that it purchases an *entire station's worth* of broadcast time.

Neither the Government nor the majority below explain why nonmedia companies that can afford to purchase broadcast facilities should be entitled to greater speech rights than other nonmedia companies. Instead, Judge Kollar-Kotelly tried to finesse "the NRA's entire line of argument" with the assertion that "the media exception only applies to the 'facilities of any broadcasting *station*,' . . . not the facilities of any broadcasting *company*." S.A. 883 (Kollar-Kotelly). Yes, it is true that Title II exempts news stories, commentaries, and editorials distributed through the facilities of any "broadcast *station*," but that obviously means that Title II exempts news stories, commentaries, and editorials broadcast by the *company* that *owns* that broadcast station.

Judge Henderson specifically found, on the basis of the NRA's substantial, uncontested, and uncontradicted evidence, that "[m]edia subsidiaries in some circumstances have been pressured by their non-media parent corporations to advance the interests of the parent or of the affiliated non-media businesses." Not surprisingly, therefore, "[s]ome media companies have refused to cover stories that might compromise the interests of the parent or of the affiliated entities." S.A. 274 ¶54a(5)(C) (Henderson).[39]

[39] Indeed, BCRA's supporters, including the late Senator Wellstone, have argued that one can no longer rely on the media to fulfill their traditional function of "hold[ing] concentrated power – whether public or private power – accountable to the people." 12 PCS/NRA 628.

In sum, the uncontested evidence before the trial court confirms that "Big Media" has become part of "Big Business." There is no longer any qualitative distinction between the two that can justify (1) immunizing broadcast corporations from the same corruption concerns that Title II ostensibly attributes to all other corporations, or (2) giving, say, General Electric a special license to comment on federal elections, while muzzling advocacy groups whose defining corporate purpose is not profit but the dissemination of ideas.

## CONCLUSION

For the foregoing reasons, this Court should enjoin Title II's prohibition on electioneering communications or, alternatively, the Wellstone Amendment.

Respectfully submitted,

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# I. CONGRESSIONAL STATEMENTS CONCERNING CONTROLLING THE QUANTITY AND QUALITY OF POLITICAL SPEECH

## A. SENATE STATEMENTS

**Statement of Sen. McCAIN:**

"What the modified bill seeks to do is establish a so called bright line test 60 days out from an election. *Any independent expenditures that fall within that 60-day window could not use a candidate's name or his or her likeness.* During this 60-day period, ads could run that advocate any number of issues. Pro-life ads, pro-choice ads, anti-labor ads, pro-wilderness ads, pro-Republican party or Democratic party ads all could be aired without restriction. *However, ads mentioning candidates themselves could not be aired.*

*This accomplishes much.* First, if soft money is banned to the political parties, such money will inevitably flow to independent campaign organizations. ***These groups often run ads that the candidates themselves disapprove of. Further, these ads are almost always negative attack ads and do little to further beneficial debate and a healthy political dialog.*** *To be honest, they simply drive up an individual candidate's negative polling numbers and increase public cynicism for public service in general."*

143 CONG. REC. S10,105 (Sept. 29, 1997).*

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* All emphases throughout this appendix have been added.

**Statement of Sen. McCAIN:**

"*I am sure we can make a judgment on a lot of ads we have seen and the same ads the Senator and I find disgusting and distasteful and should be rejected.* But at the same time, I don't know how we can say, OK, if this station doesn't run my ads, I am going to go to a judge and have the judge make them run my ads. It just is something that would be very difficult.

I would love to work with the Senator from New Mexico. He has been a steadfast stalwart for campaign finance reform. I would love to work with him to try to achieve this goal. Frankly, after going around and around on this issue, identifying who paid for the ad, full disclosure and, frankly, not allowing corporations and unions to contribute to paying for these things in the last 60, 90 days, which is part of our legislation, is about the only constitutional way that we thought we could address the issue.

I thank the Senator from New Mexico. *He is addressing an issue that has demeaned and degraded all of us because* ***people don't think very much of you when they see the kinds of attack ads that are broadcast on a routine basis.***

*As the Senator pointed out,* ***they are dramatically on the increase. I will tell you what. You cut off the soft money, you are going to see a lot less of that. Prohibit unions and corporations, and you will see a lot less of that.*** If you demand full disclosure for those who pay for those ads, you are going to see a lot less of that because people who can remain anonymous or organizations that can remain anonymous are obviously much more likely to be a lot looser with the facts than those whose names and identity have to be fully disclosed to the people once a certain level of investment is made."

147 CONG. REC. S3116 (Mar. 29, 2001).

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**Statement of Sen. McCAIN:**

"*I hope that we will not allow our attention to be distracted from* ***the real issues at hand how to raise the tenor of the debate in our elections and give people real choices. No one benefits from negative ads. They don't aid our Nation's political dialog.*** Again, if someone chooses to run negative ads, this bill will not restrict their right to do so. But we should not just throw up our hands and say, 'Who cares?' *We should seek,* within the protections of the Constitution, *to encourage a healthy political debate.*"

143 CONG. REC. S10,106 (Sept. 29, 1997).

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**Statement of Sen. McCAIN:**

"That is, so we are changing both. I say to my friend, I am changing both the definition of 'independent expenditure' and the definition of 'express advocacy.' We are doing so because there is clearly a huge problem in American politics today, which I am sure the Senator from Kentucky appreciates. There are no longer independent campaigns.

There is nowhere in any dictionary in the world the word 'independent' that would fit these campaigns. They are part of campaigns. ***To my dismay, and I am sure to every Member of this body, they are negative. And they are negative to the degree where all of our approval ratings sink to an all time low.***

. . . .

If the Senator from Kentucky believes that these are truly independent campaigns, set up and run and funded by individuals who just want to see their particular issues,

whether it be pro-life or pro-choice or workers' right to strike or any of the others, then fine.

But it is beyond me to believe that the Senator from Kentucky could have, having seen these ads he is very deeply involved in the political process that they are independent. They are not. They are appendices of the political campaigns. ***The tragedy of it is, 98 percent of them are attack ads,*** *as the Senator well knows."*

143 CONG. REC. S10,132 (Sept. 29, 1997).

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**Statement of Sen. JEFFORDS:**

"Mr. President, I understand what my good friend from Kentucky is saying, but I remind everyone what the real issue is, and that is elections. *We are talking about a system which has developed over the past couple of years which has seriously imposed upon us unfairness as far as* ***candidates*** *are concerned who* ***find themselves faced with ads, and other areas of expression, to change the election.*** Why would they spend $135 million to $200 million unless it was successful?

Let us get a real-life situation of what we are talking about. I have been in the election process for many, many years, and *I know from my own analysis* – and I think it probably is carried forward everywhere – *that the critical time in an election to make a change in people's minds is the last couple of weeks.*

Basically, I find that probably of the electorate, only about 50 percent care enough about elections to even go. That is the average across the country. Of that 50 percent,



probably half of them will make up their minds during the last 2 weeks.

*So you are out and have a well-planned campaign and everything is coming down to the end. You can go and find out what your opponent has to spend, and you can try to be ready to match that.* ***And then whammo, out of the blue comes all these ads that are supposedly issue ads, but they are obviously pointed at positions that are taken by you saying how horrible they are. So these are within the Snowe-Jeffords amendment.***

What can you do about it? You cannot do anything. You cannot even find out who is running them, unless you are lucky and have an inside source in the TV and radio stations to tell you who it is. You cannot find out. There is no disclosure.

The most important part of our amendment is just plain disclosure. If it is far enough in advance, 30 days before a primary and 60 days before a general election, at least you have time to get ready for it. If you know you are going to get all these ads coming, then you can reorder your priorities of spending. You can say, "Oh, my God, we have all this coming," and you never know until it is all over. *You are gone. You lose the election and you didn't know.* ***The opposition comes forth with this barrage and you are totally helpless.***"

144 CONG. REC. S917 (Feb. 24, 1998).

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**Statement of Sen. JEFFORDS:**

"Mr. President, I am disturbed at the DeWine attempt to solve a problem that is not there. ***I*** *was one of those back in my last election – not the last but the one before that –*

*who was exposed to this kind of advertising, who has* ***had to face seeing ads on television which totally distort the facts and say terrible things.*** *You watch a 20-percent lead keep going down* and you do not know who is putting them on. You know what they are saying is totally inaccurate, but you have no way to refute it, other than to try to get people convinced that nobody knows who put it there, who is behind it.

The constitutionality of our provisions is common sense. How can you say that something which merely asks the person who put out the ad to let everybody know who they are is unconstitutional? How in the world can you say that it is unconstitutional to require somebody to disclose who they are and what they are?

That is all we are doing in Snowe-Jeffords.

***The Wellstone amendment does make things a little more confusing in that regard.***"

147 CONG. REC. S3071 (Mar. 29, 2001).

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**Statement of Sen. SNOWE:**

"That is correct – our amendment is not intended to convey any criticism of the FEC. *The Buckley magic words test* is a very narrow one, and *has proven completely ineffective in stopping phony issue ads* ***that attack candidates.*** *My amendment offers a new approach to this problem, by creating a new category of 'electronic ads' that name candidates in broadcasts close in time to an election.*"

144 CONG. REC. S979 (Feb. 25, 1998).

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**Statement of Sen. SNOWE:**

"Any successful campaign finance reform bill must address the realities of elections as we approach the new millennium. One of those realities is the so called issue advocacy or voter education ads. We have all seen these ads: threatening music over provocative images blatantly designed to influence voters to vote against a candidate. But because these ads don't specifically say "vote against candidate X" there is currently no limit on how much can be spent on them, and no accountability.

It is obvious to anyone the purpose of these ads; to skirt current campaign finance laws that require that ads designed to influence Federal elections be paid for with hard money, and disclosed to, and regulated by, the Federal Election Commission. Under my bill, *the law would be changed in such a way to include these types of ads under hard money limits and disclosure requirements.* ***This would help limit the attack ads*** and give the public the information they need about who is paying for these ads and how much they are spending. An informed electorate is the key to any democratic system of government, and my bill will give people the information they need to make up their own minds."

143 CONG. REC. S8581 (July 31, 1997).

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**Statement of Sen. WELLSTONE:**

*"The last criterion is political equality. Everybody ought to have an equal opportunity to participate in the process.* That means the values and preferences of citizens, not just those who get our attention through the large contributions, should be considered in the debate. One

person, one vote; no more, no less; one person, same influence. Each person counts as one, no more than one. That is the standard. That is what it is all about. *That precious principle, that precious standard of representative democracy, is being violated.*

. . . .

Finally, I have to say this because I forgot to mention this earlier. ***This is the part of the McCain-Feingold legislation that I think is perhaps most important. I remember the 1996 election. I think these issue advocacy ads are a nightmare. I think all of us should hate them.*** *I very much would like to apply this to independent expenditures as well.* I want to be clear about it. But in Minnesota, it was a barrage of these phony issue advocacy ads, where they do not tell you to vote for or against; ***they just bash you*** and then they say: Call Senator So-and-so.

They are soft money contributions with no limits on how much money is raised, no limits on how the money is raised. It could be in $100,000 contributions, $200,000 contributions, and make no mistake about it, this is in both parties. These big soft money contributors have a tremendous amount of access and way too much influence in both parties.

***So with one stroke, it would be a wonderful marriage. We could get some of this poison politics off television. We could get some of these phony ads off television.*** We could build more accountability, and we would make both political parties, I think, more accountable to the public."

145 CONG. REC. S12,606-07 (Oct. 14, 1999).

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**Statement of Sen. WELLSTONE:**

***"The point is, if you are concerned about poison politics, leave this loophole open, let these interest groups run these sham ads. Overwhelmingly they are negative, they can be vicious, they are poison politics."***

147 CONG. REC. S2846 (Mar. 26, 2001).

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**Statement of Sen. WELLSTONE:**

*"If you want to try to get as much of the big money out of politics as possible, you have to support this amendment.* ***If you hate bitter, personal, poison politics, you have to support this amendment.*** Because, before the Presiding Officer came in, I was saying that *the Brennan Center said that 70 percent of the money spent by these sham ads by these groups and organizations is personal, negative, and going after people's character.* I am glad to say that only about 20 percent of the candidates' ads do that."

147 CONG. REC. S2849 (Mar. 26, 2001).

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**Statement of Sen. CANTWELL:**

***"This bill is about slowing the ad war.*** It is about calling sham issue ads what they really are. ***It is about slowing political advertising and making sure the flow of negative ads by outside interest groups does not continue to permeate the airwaves.*** *Ninety-eight million dollars worth of these ads ran in the 2000 election by narrowly focused special interest groups* based out of Washington, DC. This legislation will change that and

again focus these debates more on the public agenda. This bill also stops the unlimited flow of corporate contributions, or soft money, *that contributed to the volume of ad wars in the 2000 election.*"

148 CONG. REC. S2117 (Mar. 20, 2002).

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**Statement of Sen. CANTWELL:**

"*The Seattle Post Intelligencer noted earlier this week that campaign ads 'rained down on – or bludgeoned, according to some – viewers throughout the late summer and fall.* And this wasn't an intermittent, drip torture kind of rain that Seattle residents know so well. *It was a deluge, a constant unavoidable torrent, stretching across three solid months.'*

***With this constant torrent of negative advertising, it is no wonder that voting among 18 to 24 year olds has dropped from 50% to only 32%*** – *a much steeper decline than overall turnout.*

***Part of the reason for this disaffection with voting and with politics is undoubtedly due to negative attack advertising.***"

147 CONG. REC. S2698 (Mar. 22, 2001).

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**Statement of Sen. BOXER:**

"***Another good thing about McCain-Feingold: Those vicious attacks that have come from large soft money contributions will not be able to come 60 days before your election.*** *That is a big plus because that is what*



***we find – that candidates at the end simply cannot respond to this barrage of activity.***

***So I feel personally grateful,*** going into an election cycle, that in 2004 candidates will not have this burden to raise hundreds of thousands of dollars from one source in soft money. That will not be allowed. I think that is good for the candidate. I think that is good for the country, it is good for the legislative process. ***We will not be hit by these last-minute ads with unregulated soft money at the end, to which we will be unable to respond.***"

148 CONG. REC. S2101 (Mar. 20, 2002).

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**Statement of Sen. BOXER:**

"I have to tell you, when I think about speech, I think about both sides of it. *If you have an independently wealthy billionaire running against you in a State like California, and he writes checks every day and bashes you on television every day and bashes the other opponents that he is running against every day, I believe we should ask, what about the free speech rights of the opponents?* What about the speech of the other people that are drowned out because of money? ***If you equate money and speech, it seems to me you are saying someone who is wealthy has more speech rights than someone who is not.***

This is not the American way. *We are all created equal.* That is the basis of who we are as a nation. I really hope that we can get past this notion that money is speech and that we will move forward with a comprehensive bill.

My one disappointment with the substitute pending before the Senate, is that it is not as comprehensive as the first version of the McCain-Feingold bill. However, I respect the judgment of the Senators that it would be best at this time to zero in on two horrible abuses of the system.

One abuse is the soft money abuse, which means unregulated dollars of any amount that flow into political parties. We have seen the hearings that are going on by this U.S. Senate and over in the House. If anything, we come away with this: Let's put an end to soft money. We could point fingers all day this politician, that politician, where the calls were made, who made them but I guarantee that gets us nowhere. The issue is the system. There will be enough examples around from both parties. This is not the problem.

So if we get exercised about these hearings and I have seen colleagues here who are very exercised about them they should go over to John McCain and Russ Feingold and tell them they are on their side. There ought to be some controls on the soft money contribution, and those controls are now pending before the Senate. *The second area of abuse tackled by the McCain-Feingold bill is the so called issues advocacy advertisements. This is where you take an organization with endless sums of money to put into an attack ad against the candidate they don't like.*

Under current law, individuals can only give $1,000 in the primary and $1,000 in the general to the candidate, but issues advocacy has grown into huge loophole. *These so called issues ads are not regulated at all and mention candidates by name.* ***They directly attack candidates***



***without any accountability. It is brutal.*** I have seen them. I have seen them from both sides.

*I can tell you, it is totally unfair and totally unregulated* ***and vicious.*** *It is vicious.* ***We have an opportunity in the McCain-Feingold bill to stop that and basically say, if you want to talk about an issue, that is fine, but you can't mention a candidate.*** If this is truly issue advocacy, you can't mention a candidate a few weeks before the election.

If you want to talk about an issue day and night, talk about the issue, whether it is choice, the environment, health care, gun control talk about it. *But* ***once you attack a candidate, that is not an issue ad. This is what the Feingold McCain will go after.***"

143 CONG. REC. S10,208-09 (Sept. 30, 1997).

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**Statement of Sen. BOXER:**

"*Second, the McCain-Feingold amendment bans* ***attack advertising*** *disguised as 'issue ads' by corporations and unions within 60 days of an election.*"

144 CONG. REC. S10,168 (Sept. 10, 1998).

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**Statement of Sen. DASCHLE:**

"We also have a serious problem with regard to the ads themselves and all that comes from spending this money. It is the amount of money, the perception of to whom we are indebted, but *now we also have a problem*

*with the **virulent advertising** that comes from it. **I believe that negative advertising is the crack cocaine of politics.*** We are hooked on it because it works. We are hooked on it because we win elections using it. There is no accountability, no reporting; it is publicly not tied to any candidates. *And I expect that in 1998 we are going to see a meltdown of the process, because **we are going to see more virulent ads** than we have ever seen in our lifetimes. **The crack cocaine of politics will be at work again.***

*Negative ads from anonymous sources push candidates to the margins. **Candidates become bit players in their own races.** How many times have I heard candidates actually say, 'I couldn't keep track of who was on my side. I'd watch television and I'd hear my name used pro and con, and I didn't have anything to do with those ads. I am sitting like a man at a tennis match, watching both sides play it out.'* And the debate now is defined by who has the most money; that is how it is defined."

144 CONG. REC. 868 (Feb. 24, 1998).

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**Statement of Sen. DASCHLE:**

"A 1997 study by the respected Annenberg Public Policy Center at the University of Pennsylvania found that phony 'issue ads' are nearly identical to campaign ads – with two exceptions. *The 'issue ads' are more **attack-oriented and personal.*** And, it is harder to identify the sponsor. ***These ads epitomize the negative campaigning*** – without any accountability – ***the public so dislikes***."

145 CONG. REC. S12,660 (Oct. 15, 1999).

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**Statement of Sen. KENNEDY:**

"In recent years, the amount of money spent in Presidential campaigns has doubled every 4 years. Senate and House races now cost millions of dollars. ***Election campaigns have become more and more negative, with misleading TV spots that traffic in halftruths or outright falsehoods.*** And corrupting and corroding it all are the massive abusers of the current loophole ridden campaign financing laws."

143 CONG. REC. S10,271 (Oct. 1, 1997).

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**Statement of Sen. LIEBERMAN:**

"The Annenberg study further found that *more than 40 percent of the 1996 ads **plainly attacked candidates**, not issues.* One of the witnesses before our committee said last week that *by his review of the ads, the **issue ads were actually more negative to candidates** than the candidate ads were.* Some ads don't bother with issues at all."

143 CONG. REC. S10,141 (Sept. 9, 1997).

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**Statement of Sen. DURBIN:**

"On the Saturday night before the election last November, bone weary, I pulled into my apartment in Chicago, and I was going to relax a little bit. It was in the closing days of the campaign. So I slumped down in a chair, grabbed the remote control to listen to Saturday night Live. Somewhere between the news and Saturday Night Live, ***up pops four television commercials, one***

***after the other, and every one of them blasting me. What a treat that was to sit in the chair and get pummeled by four different commercials.***

The most unique thing was that not a single one was paid for by my opponent, the Republican Party in Illinois, or the National Republican Party. *They were paid for by committees and organizations that most people never heard of.* These are organizations which mushroom up during campaigns, take some high sounding name, collect millions of dollars, undisclosed and unreported, and run ads, the most negative ads on television, against politicians. That is an outrage. It is an outrage that I have to account for every dollar I raise and spend and I have to identify the television commercials that I put on, either comparing my record with my opponent or speaking about something I believe in, and these groups can literally run roughshod over the system, spending millions of dollars without any accountability.

*McCain-Feingold addresses that.* Thank God it does. *If we don't put an end to this outrage, most of these other reforms are meaningless. To eliminate soft money and to allow special interest groups, whether on the business or labor side, to continue to spend money unfettered in issue advocacy and the like is outrageous.* The McCain-Feingold legislation is an idea whose time has come."

143 CONG. REC. S10,124 (Sept. 29, 1997).

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**Statement of Sen. DURBIN:**

"People are sick of our advertising. ***It is too negative. It is too nasty. These drive-by shooting ads that we have, 30-second ads by issue groups you never heard***



***of, at the last minute of a campaign***, and candidates, myself included, spending a lot of time groveling and begging for money, that does not help the process. ***It does not help our image.*** It does not encourage people to get involved.

What McCain-Feingold is about is not just changing the law but changing the attitude of the public toward the political campaigns. And unless and until that happens, we face a very serious problem in this country. What McCain-Feingold goes after in eliminating soft money is something that has to happen. Soft money is what is left after all of the restrictions on hard money have been applied.

For those who are not well versed in the language of politics and campaigns, 'soft money' can be corporate money, it can be money that is given by a person that exceeds any kind of limitation. It can be money that is used indirectly to help a campaign. And that sort of expenditure has just mushroomed.

I am glad that the legislation of Senator Feingold and Senator McCain is going to ban soft money. *I also think it is critically important they do something about these issues ads."*

144 CONG. REC. S879 (Feb. 24, 1998).

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**Statement of Sen. DURBIN:**

"There is not only something wrong with *the advertising*, it *has become* ***so negative, so nasty, so dirty, that people are disgusted with it.*** There is something wrong with the products. Candidates for the House and Senate

are losing their reputation or seeing their integrity maligned because we spend so much time grubbing for money. People believe that we are captives of special interest groups. And because they are sick of the style of campaign and because they have little or no confidence in those of us who wage the campaigns, they stay home."

143 CONG. REC. S10,123 (Sept. 29, 1997).

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**Statement of Sen. DURBIN:**

"*There is another element, too – the advertising that we put on television during the course of the campaign. A lot of people are turned off by it.* Most campaigns hire sophisticated people to make those ads. They hire pollsters who go out and take legitimate samples of American opinion – samples within a given State – and convert those samples into messages; 30-second messages that go up on television. Some of the messages are positive. *Some are negative.* ***It is the negative ones that unfortunately give us the bad name and lead a lot of people to say that this process itself is so fundamentally flawed.***"

144 CONG. REC. S10,060 (Sept. 9, 1998).

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**Statement of Sen. DORGAN:**

"And guess what? What kind of advertising was this? *Eighty-one percent of it was* ***negative advertising****; 81 percent negative advertising.* ***That is the air pollution in this country that we ought to worry about. We ought to do something about it.***"



143 CONG. REC. S10,097 (Sept. 26, 1997).

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**Statement of Sen. DORGAN:**

"Finally, campaign finance reform is also part of what our caucus is committed to doing. There are a lot of discussions about what pieces will work and what pieces will not work with respect to campaign finance reform. I want to describe one little piece that I think is important. ***The most significant kind of air pollution in America today is the 30-second political ad that does nothing but tear down someone's opponent. It is a 30-second slash and burn, cut and run ad that contributes nothing to our country.*** The first amendment gives everybody the right to do that. We won't change that. But there is a little thing we can change. We can, by Federal law, say that every television station is required to offer the lowest rates on the rate card during political advertising during a certain period. I propose that we change that law to say that low rate is only available to candidates who run advertisements that are at least 1 minute in length. Let's require people to say something significant in one in which the candidate himself or herself is in the advertisement 75 percent of that 1 minute."

144 CONG. REC. S702 (Feb. 12, 1998).

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**Statement of Sen. DORGAN:**

"This overly narrow definition of what constitutes express advocacy *has created a giant loophole for* ***attack***

***ads***. Simply by avoiding the magic words I mentioned above, *corporations, unions, and other special interest groups can pay for brutal attack ads*. Anyone who has seen some of these ads can tell they're intended to influence the outcome of Federal elections. And because they can be paid for with soft money, groups can raise money for them without limits, buy them in the millions of dollars, and never have to disclose what they're doing to the FEC."

143 CONG. REC. S8933 (Sept. 8, 1997).

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**Statement of Sen. DORGAN:**

"And what about the issue ads which Senator Durbin mentioned as well? *These issue ads – are they ads that contribute to this political process? Eighty-one percent of them are negative. They represent the slash, burn and tear faction of the political system*. Get money, get it in large chunks from secret sources and put some issue ads on someplace and try to tear somebody down."

144 CONG. REC. S880 (Feb. 24, 1998).

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**Statement of Sen. DORGAN:**

"I would like to just mention two additional items before I close. ***One of the concerns I have about our political system is so much of the advertising is negative.*** There is nothing you can do about that; I understand that. We cannot prohibit this kind of advertisement. We can say, if you are going to put this kind of advertisement on the air, you have to play by the rules and get hard money and disclose the donors. There is nothing



wrong with that. But we cannot prohibit any advertisement. *So much of it now is negative and so much of it is a 30-second little political explosion that goes on across our country where candidates are not even hardly named, at least with respect to the person's campaign, in financing the 30-second ad. It is a nameless, faceless, little bomb directed to destroy, tar or feather some other candidate.*"

143 CONG. REC. S10,138 (Sept. 29, 1997).

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**Statement of Sen. DORGAN:**

"Mr. President, *I rise today to discuss legislation I am introducing to address a significant air pollution problem we have in this country*.

No, I'm not talking about smog, or acid rain, or the ozone layer, ***I'm talking about broadcast air pollution. And by that I mean the 30- second, slash-and-burn, hit-and-run political ad that does nothing but cut down an opponent.***

Can you think of any other business in this country that sells its wares only by tearing down the opposition? Do airlines ask you to consider their services because their competitors' mechanics are unreliable, and try to conjure up images of plane crashes to get you to switch carriers? Do car manufacturers sell their products by raising dark, misleading doubts about the safety of their competitors' autos? Does McDonald's run ads raising the threat of E-coli bacteria in Burger King's hamburgers?

Of course not, but that's precisely the way we compete in politics against each other.

*It is a pretty sad state of affairs when the American people get a more informative and dignified discussion about the soda they drink or the fast food restaurant they prefer than they do in the debate about what choices to make for our country's future. It is time to do something about it.*

We cannot and should not attempt to limit speech. But there is something we can do to provide the right incentives. Under current law, television stations are required to offer the lowest unit rate to political candidates for television advertising within 45 days of a primary election, and within 60 days of a general election."

The legislation I am proposing today would change that law to provide that the low rate must be made available only to candidates who run ads that are at least one minute in length, in which the candidate appears at least 75 percent of the time."

144 CONG. REC. S1076 (Feb. 26, 1998).

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**Statement of Sen. COLLINS:**

"The situation with bogus issue ads is not better. That practice undermines the two major objectives of our election laws, namely, placing limits on contributions and disclosing the identity of those making the contributions. Without such disclosure, we lose accountability. *A recent study found that as accountability in political communications declines, levels of misinformation and deceit rise.* ***Thus, it is no surprise that bogus issue ads almost always carry a negative message, something which***



***all in this body purport to decry.*** *The question is –* ***are we willing to do something about it?"***

144 CONG. REC. S875 (Feb. 24, 1998).

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**Statement of Sen. COLLINS:**

"I want to respond, also, to the comments made by the Senator from Connecticut and the Senator from Michigan and thank them for their support of the Wyden-Collins proposal. *Senator Dodd and Senator Feingold also raised a very important point, and that is,* ***the deluge of negative attack ads discourages people from voting and really turns off the American public.*** This is exacerbated by the fact that a lot of times it is not evident who is sponsoring these ads, who is behind these charges and allegations that are hurled particularly in the final days of the campaign.

I believe the Snowe-Jeffords amendment will help in that regard and that the amendment Senator Wyden and I are sponsoring today will make very clear that when a candidate launches a negative ad attacking his opponent, that candidate will have to take responsibility for that ad."

147 CONG. REC. S2695 (Mar. 22, 2001).

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**Statement of Sen. CLELAND:**

"I look back at the 1976 decision by the Supreme Court which, in effect, equated the ability to spend money with free speech. In the campaign finance hearings a couple of years ago, I asked the simple question: If you do not have any money in this country, does that mean you do not have any speech? Of course not. ***The problem is we***

***have equated money with speech and the ability to get on the air with 30- and 60-second spots which make us want to throw up.***

I share the concern of the distinguished Senator from Alabama, Mr. Sessions, about these negative attack ads that come from out of State and seem to originate from God knows where. They come in and assassinate someone's character. That is not the country for which Senator McCain and I fought. That is not the kind of democracy we intend to serve. *That is one reason why I have bonded with him in such a close way: to support cleaning up this incredible process.*"

145 CONG. REC. S12,612 (Oct. 14, 1999).

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**Statement of Sen. REED:**

"This would curtail what has become an explosion throughout our American political system. *Phony issue advertisements are unconstrained, cropping up suddenly, without attribution,* ***to strike at candidates.***"

144 CONG. REC. S884 (Feb. 24, 1998).

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**Statement of Sen. DODD:**

"*If you look at campaign advertising,* ***the attacks we wage against each other****, the personal degradation we attach to and associate with our political competitors, what has happened is,* ***we have so devalued public service and the public life of elected office that the public has become understandably disgusted with the condition of politics in America***. We have no one to



blame for that but ourselves. *In no small measure that has occurred because of the rising amount of dollars that are spent being convinced by political consultants that the best way to win office is not to convince anyone of the merits of your argument but if you can convince people that your opponent is somehow unworthy of even consideration for the office*, let alone that his ideas or her ideas may lack substance, then you can win a seat in the Congress of the United States.

Thus we see, as we did last year, where, of the 200 million eligible voters in America, only 50 percent voted; 100 million Americans cast their ballots for the Presidency of the United States, a decision that was made by a handful of votes in one State, and 100 million of our fellow citizens did not even show up on election day, where a tiny fraction, had they shown up in one State, would have resulted in a different outcome than what occurred as a result of the recounts and so forth that occurred in the State of Florida.

I suspect that a good portion of that 100 million didn't show up because they forgot or because they had something better to do that day.

I suspect a substantial portion didn't show up because they are disgusted with the process; *they are sick and tired of coming into September and October after an election year and* ***you can't turn on a single bit of programming without some mudslinging going on, attacking of one another, blistering one another****. Whether it is through our own ads,* ***or the ads of outside groups just trying to destroy the reputations of people seeking public life***, I suspect that

has more to do with the declining numbers of people checking off on the 1040 forms, the resource to support Presidential public financing.

***One of the reasons why McCain-Feingold deserves support, in my view, is because there is some hope that this will put the brakes on, slow this down enough*** *so we don't have an unending exponential growth of dollars pouring into the coffers of candidates and groups out there year in and year out, destroying not only the candidates, but the public's confidence in a political system* that has contributed greatly to this great Nation over 200 years."

147 CONG. REC. S2943 (Mar. 27, 2001).

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**Statement of Sen. DODD:**

"Mr. President, let me thank our colleague from New Mexico for proposing this amendment. All of us here, and those who pay any attention at all to politics in this country and are confronted with this, as most Americans are, if you look at this chart by the Senator from New Mexico, ***particularly in that August, September, October period of an election year, it is hard not to be confronted with the assault*** – that is the only way to describe this – *of ads on television from one end of the country to the next, on every imaginable radio station, television station, now cable stations* – ***this bombardment that occurs.***

What the Senator from New Mexico has graphically demonstrated with his chart is that *the overwhelming majority of these ads are* ***the so-called attack ads. Usually, they are very vicious***, designed to not promote



one's ideas nor one's vision, one's agenda – if they are elected to Congress or the Senate or the Presidency or some other office – but merely to try to convince the rest of us why you ought to be against someone; not why you ought to be for me but why you ought to be against my opponent.

*The least enlightening part of a campaign is the proliferation of these ads. They do nothing, in my view, to contribute to the education, the awareness of the American people.* ***We have seen an explosion of them over the past few years.*** I suspect this has probably been in the last 6 or 7 years, with the explosion of soft money ***that the McCain-Feingold bill seeks to shut down.***"

147 CONG. REC. S3113 (Mar. 29, 2001).

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**Statement of Sen. MURRAY:**

"Given the problems in the system, I developed a set of principles for reform that have guided my decisions throughout this debate. My principles for reform are: *First, there should be less money in politics. Second,* ***I want to make sure that average voters aren't drowned-out by special interests or the wealthy.*** Third, we must demand far more disclosure from those who work to influence elections. When voters see an ad on TV or get a flyer in the mail, they should know who paid for it. There must be disclosure for telephone calls and voter guides. Citizens have a right to know who's trying to influence them. ***We've seen a disturbing increase in the number of issue ads, which are often negative attack***

***ads.*** Too often, voters have no idea who's bankrolling these ads."

147 CONG. REC. S3236 (Apr. 2, 2001).

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**Statement of Sen. BINGAMIN:**

"It should come as no surprise to any of us that more and more *Americans are repulsed by these anonymous assaults* and the sheer volume of money pouring into our election system. As a consequence, they are distancing themselves from the political process. That is the greatest tragedy of all. Americans are so turned off by our political system that they don't even vote on election day. When they do vote, often it is not the sense of voting for the better of two candidates; it is a perception that they are voting for the lesser of two evils on the ballot.

*With* a tidal wave of campaign cash flowing into our political system, ***the torrent of negative advertising*** *on the airways*, and the lack of meaningful disclosure or accountability, ***it is becoming increasingly difficult, almost impossible, for the American people to feel good about any candidate***, or their participation in the democratic process."

144 CONG. REC. S10,081 (Sept. 9, 1998).

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**Statement of Sen. WYDEN:**

"Mr. President, I come to the floor this morning with Senator Collins of Maine to offer a bipartisan amendment



*that we believe will help slow the explosive growth of negative political commercials that are corroding the faith of individuals in the political process.* I also thank my colleague from New Mexico, Senator Bingaman, and Congressman Greg Walden of Oregon on the House side, who has also been extremely interested in this issue over the years.

***Negative commercials are clearly fueling citizens' cynicism about politics. Those negative commercials are depressing voter participation and, in my view, they are demeaning all who are involved in the political process.***"

147 CONG. REC. S2692 (Mar. 22, 2001).

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**Statement of Sen. BAUCUS:**

"The problem we're really facing is how grey the campaign finance laws have become. McCain-Feingold, as amended, would make them black and white. Just take issue advocacy advertising as an example. In the last couple campaigns, the lines have been blurred between express advocacy, which requires federal disclosures, and issue advocacy.

We can all recall advertisements in our own state that just barely skirted the lines. In Montana, the unregulated soft money ads started early. *Close to a year before the election,* ***groups started attacking candidates with mud-slinging ads.*** Groups with benign sounding names that hid their partisan bent. Ads that attacked candidates, and even told people where to call, but somehow fell under the 'issue

advocacy' definition, and were exempt from campaign finance laws."

147 CONG. REC. S3239 (Apr. 2, 2001).

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**Statement of Sen. JOHNSON:**

"I personally have just been through one of the longest and, frankly, one of the most expensive per voter Senate campaigns in the history of America. My opponent and I spent a total of $24 for every vote cast. And, if one were to include the money spent by the national party organizations and the various independent groups, total spending would rise to around $29 per vote. All of this money produced one of the longest political campaigns the Nation has ever seen. My opponent began running campaign commercials 17 months from the election, *then 13 months before the election an attack ad campaign, one that I had to respond to*, although I was not yet even formally an announced candidate in the race.

***That is the kind of campaign negative vitriolic, longwinded, longstanding that did nothing to improve the confidence of the American public in our political process,*** and did nothing to restore confidence that in fact the system reflects their values and their ideals and their values. *It was simply a system awash in too much money.*"

143 CONG. REC. S10,395 (Oct. 6, 1997).

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**Statement of Sen. LEVIN:**

"If we do not do it, ***if we do not put a stop to the money chase and the attack ads that are overwhelming the system and disgusting the American people, we will let down our constituents.***"

143 Cong. Rec. S10,127 (Sept. 29, 1997).

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**Statement of Sen. COCHRAN:**

"We all see the ads. ***We are overwhelmed by the total number of television ads*** *and other mailings that are sent out during a political campaign these days in House races, in Senate races, and even the Presidential election this past year. Voters have to be confused.* Who is running the ads? It says "The Good Government Committee," but who is that? Or it says something else that sounds really good, as though they are on the side of right and justice and right thinking. So they put the ad up that suggests or insinuates that one or the other of the candidates isn't on the right track, either on one subject or just generally speaking, it isn't good for the State or the district or the country, or suggests that there may be something in the background of the candidate that is suspicious, that needs to be looked at very carefully. ***The insinuation, the misleading tone, the negative aspect of political campaigns is fueled by the huge amounts,*** the juggernaut, an almost imperceptible amount of influence being brought to bear on these

campaigns by who knows what source, who knows who is behind the spending."

147 CONG. REC. S2444 (Mar. 19, 2001).

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**Statement of Sen. MIKULSKI:**

"*The McCain-Feingold bill does several things.* It bans soft money raised by national parties and by candidates for Federal office. *It ends issue ads,* ***which are really attack ads*** *under the guise of 'issues.'* I want to close the loophole which allows groups to skirt the current election law – and this bill does just that. Finally, it clarifies what election activities non-profits can do on behalf of our candidates for Federal office."

147 CONG. REC. S2691 (Mar. 22, 2001).

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**Statement of Sen. BRYAN:**

"The McCain-Feingold proposal addresses two important issues that could begin to turn our campaign system around. ***The legislation proposes*** to ban soft money contributions to our national political parties and ***to curb the use of attack advertisements*** *hidden behind so-called 'issue advocacy' campaigns."*

144 CONG. REC. S1038 (Feb. 26, 1998).

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## B. HOUSE STATEMENTS

**Statement of Rep. SHAYS:**

*"The other thing is that we want to deal with the sham issue ads.* ***The sham issue ads are those campaign ads that basically almost tanked the gentleman from Arizona.*** We would ban those sham issue ads. We would not see corporate money being used, we would not see union dues money because it would be illegal, because once it is a campaign ad, they cannot do those ads. They can do it through PAC contributions, but not through members' dues, and they cannot use corporate money."

144 CONG. REC. H5480 (July 14, 1998).

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**Statement of Rep. ALLEN:**

***"If one is a TV viewer and they like endless streams of deceptive anonymous issue ads in election years, oppose reform; but if one prefers honest and less frequent ads, support Shays-Meehan."***

145 CONG. REC. H8182 (Sept. 14, 1999).

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**Statement of Rep. HOEFFEL:**

"Mr. Chairman, I thank the gentleman for yielding me this time, and I rise in opposition to the Ney substitute, because it is clearly designed to send campaign reform to conference where it will die. I rise in full support of the Shays-Meehan underlying bill.

It is time that we get soft money out of Federal elections. *It is time that we control the sham issue ads.* In fact, Mr.

Chairman, it is time for a lot more reform. This is only one good step forward into cleaning up our Federal elections.

We should consider other steps that would limit the corrupting influence of private money on public campaigns. We should consider a measure of public financing for congressional elections, as we do for Presidential elections. ***We should consider ways to raise the discourse and stop the negative ads***, and do other things to clean up our system and restore a sense to the democratic process that it belongs to the people, not the big donors, and restore a sense that it matters what we say in campaigns and what people do in campaigns."

148 CONG. REC. H389 (Feb. 13, 2002).

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**Statement of Rep. BAIRD:**

"Let me share with my colleagues an example actually from our recent experience. We had a very expensive campaign, I will admit it, *because* ***we were getting attacked heavily, one of the number-one targets*** *in the whole country*. But we also had a grassroots campaign. That is what we need to have more of. We had 1,100 volunteers in the field on the day of the election, 1,100 people going around the district working telephones, saying why they cared so much about that election. I know my good friend from Illinois had a similar organization. That is politics at its best. *Politics at its best is people working in the field for people they believe. Politics at its worst is when people pay telephone solicitors to call with smear campaigns.* ***Politics at its worst are last-minute $100,000, $200,000 and $300,000 TV attack ads.***



*What I am hoping we can do is inspire the young people who come watch us each day and watch us on TV and who are in our schools today to be a part of politics at its best. This bill will help reduce the impact of politics at its worst and maybe inspire people to do more."*

145 CONG. REC. H1311 (Mar. 16, 1999).

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**Statement of Rep. CAPPS:**

*"Last year, as was mentioned,* ***I endured four grueling elections and watched as wave after wave of attack ads flooded my district under the guise of informing voters.*** *These ads distorted both my record and the record of my opponent.*

The Shays-Meehan bill effectively ends the misuse of issue advertising. It does so by requiring all ads which clearly urge the support or defeat of a candidate in a Federal election to be treated like what they are, political ads.

Let us restore the public's trust in our political system. We need to pass the Shays-Meehan bill and send it to the Senate today."

145 CONG. REC. H8190 (Sept. 14, 1999).

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**Statement of Rep. BONIOR:**

"Mr. Speaker, *every 2 years* ***America's airwaves are flooded with political attack ads. These negative ads leave voters feeling cynical, disenchanted, and with little faith in politicians or in the political process.***

*These attack ads are also the main reason why we spend so much time fund-raising, defending ourselves against vicious 30-second spots,* ***often now funded by outside groups,*** and have become more and more costly every single year and every single election. Free TV time for credible candidates could drastically lower the cost of campaigns and eliminate the need for excessive fund-raising.

The broadcasters and the radio folks and the TV folks and the cable folks, they do not own those airwaves. They belong to the American people, not the media corporations."

144 CONG. REC. H3726 (May 21, 1998).

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**Statement of Rep. BONIOR:**

"Although some have proposed spending even more on campaigns on this side of the aisle, the American people think just the opposite. Nine out of ten believe too much money is being spent on political campaigns today. *So we need* to fix the system, to get the money down, to set limits, ***to stop negative advertising,*** *and to get Americans voting again."*

143 CONG. REC. H3111 (May 21, 1997).

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**Statement of Rep. BARRETT:**

"I think that the Shays-Meehan proposal takes away some of the cynicism that is out there because it lets people understand that we do not want unregulated soft money coming into this system. ***We do not want drive-by***



***shootings that are basically what some of these 30-second commercials are.*** What we want is we want integrity in the system. And I think that this is a very serious and a very meritorious attempt to bring some integrity back to the system."

144 CONG. REC. H4796 (June 18, 1998).

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**Statement of Rep. ESHOO:**

"We should be having a real debate on real reform, the Shays-Meehan bill. It bans the unregulated, unlimited donations to political parties known as soft money; it establishes exacting disclosure requirements; and it ***limits the fund-raising of independent groups who run those infamous TV attack ads."***

144 CONG. REC. H1735 (Mar. 30, 1998).

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**Statement of Rep. ROUKEMA:**

"They look at the way this system works – the explosion of soft money, fat cats buying access. White House coffees, the Vice-President dialing for dollars, foreign contributions. Members and Senators spending every waking moment raising cash, ***attack ad upon attack ad piled on top of attack ad."***

145 CONG. REC. H8196 (Sept. 14, 1999).

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**Statement of Rep. WU:**

"The Shays-Meehan bill does this: It bans soft money raised by national parties and by candidates for Federal office. It ends issue ads, ***which are really attack ads*** *under the guise of 'issues.'* And, it clarifies what election activities non-profits can do on behalf of our candidates for Federal office."

148 CONG. REC. H354 (Feb. 13, 2002).

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**Statement of Rep. ISRAEL:**

"*When we stop the special interests*, when people have as much of a voice in this House as the special interests do by ***flooding our airwaves with*** *unregulated soft money,* ***negative attack ads****, that is when people will be put first.* When people, regular people, working people have as much influence in this House as the special interests who flood campaign treasuries with unregulated soft money special interests contributions, that is when we will put people first. Maybe that is when we will get a prescription drug benefit."

148 CONG. REC. H271 (Feb. 12, 2002).

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**Statement of Rep. EDWARDS:**

"Free speech is a fundamental right, but in a democracy, *the strength of a citizen's voice should depend upon the quality of one's ideas, not the quantity of one's bank account.*

Let us unite once again in defense of our democracy. Let us affirm the great American ideal that this should truly be the people's House, *where the voice of every citizen is heard, not just a privileged few.*"

148 CONG. REC. H374 (Feb. 13, 2002).

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## II. CONGRESSIONAL STATEMENTS CONCERNING PRESERVING CANDIDATES' CONTROL OVER CAMPAIGNS

### A. SENATE STATEMENTS

**Statement of Sen. BOXER:**

"We need to ensure that these issue ads become a thing of the past. What a phony deal that is. That is as much an ad as the ad I put on for myself. How is this for an issue ad? 'Senator X has just cast a vote against a particular bill. It is a disaster for our country. Call Senator X and tell her she is wrong.' That is an issue ad? No. *That is a personal attack.*

'Senator Y has supported a bill that is going to hurt our country's economy. Call Senator Y. Here are the three reasons he is wrong on that,' and you mention the Senator's name over and over. By the way, you can even show the Senator's face.

That is not an issue ad. *That is a direct attack ad.* Was it done against my opponent? Yes, it was. Was it done against me? Yes, it was. It is uncontrolled. ***It brings in other issues that the two candidates themselves do not even want to talk about. It unbalances the whole debate in the campaign.*** It has to be a thing of the past."

145 CONG. REC. S12,608-09 (Oct. 14, 1999).

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**Statement of Sen. BOXER:**

"This isn't just a hypothetical: *In my own state, outside special interest groups regularly spend millions of dollars attacking California congressional candidates,*



***often leaving those candidates mere spectators in their own election campaigns.***

*The amendment prohibits corporations and unions from buying these stealth attack ads,* and anyone else – individuals and nonprofit organizations – has to disclose what they are doing."

144 CONG. REC. S10,169 (Sept. 10, 1998).

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**Statement of Sen. DASCHLE:**

*"Negative ads from anonymous sources push candidates to the margins.* ***Candidates become bit players in their own races.*** *How many times have I heard candidates actually say, 'I couldn't keep track of who was on my side. I'd watch television and I'd hear my name used pro and con, and I didn't have anything to do with those ads. I am sitting like a man at a tennis match, watching both sides play it out.'* And the debate now is defined by who has the most money; that is how it is defined."

144 CONG. REC. S868 (Feb. 24, 1998).

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**Statement of Sen. LIEBERMAN:**

*"We run the risk here, Mr. President,* ***of the candidates becoming bit players*** *in a contest that occurs at a higher level between dueling interest groups spending millions of dollars running issue ads with soft money."*

143 CONG. REC. S10,141 (Sept. 29, 1997).

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**Statement of Sen. GLENN:**

"The legislation that we have had before us over the past few days takes key steps to correct the two worst problems, the proliferation of huge amounts of soft money and the explosion of calculated issue advertising which exists outside the reach of existing laws simply because it avoids a key term such as 'vote for' or 'defeat.' ***But the proliferation of issue advocacy candidates are becoming footnotes in their own campaigns*** *struggling to conduct substantive debates* on issues of local importance against the din of millions of dollars of issue advertising by national interest groups."

144 CONG. REC. S1047 (Feb. 26, 1998).

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**Statement of Sen. MURRAY:**

"*It reaches the point where* ***you almost cannot hear the voices of the candidates*** *or the people anymore, only the voices of the dueling special interests.* We do not know who pays for these ads, where they get their money, or what they stand to gain if their candidate wins. Yet they have found ways to have a huge influence over the election process."

144 CONG. REC. S10,167 (Sept. 10, 1998).

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## B. HOUSE STATEMENTS

**Statement of Rep. WAMP:**

"The two things we should focus on is banning soft money, which any thinking person is for, it is way out of hand; and, secondly, trying to hold accountable *these outside groups that come in in the last few days of a campaign and assassinate people with unlimited, unregulated, now huge sums of money dumped from nowhere in campaigns.* ***Pretty soon we as candidates will not even be able to control the message in our own campaigns.***"

144 CONG. REC. H4787 (June 18, 1998).

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**Statement of Rep. MALONEY:**

"*I think that all of us have been attacked by these so-called independent groups in our campaigns.* ***What is very troubling, in many cases I believe these independent groups are spending more money than the candidates themselves.*** But I am all for free speech. We all support free speech. Just let the American public know who is paying for it. Is that too much to ask? But the real point is that we have before us a very carefully crafted bill that has what I call the fragile flower of consensus. We have a majority of Members in this Congress that support Shays-Meehan. We can pass it and enact it into law. We can consider other important amendments in the commission bill. That is what we should be doing tonight."

144 CONG. REC. H6801 (July 30, 1998).

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**Statement of Rep. CAPPS:**

"I want to even become more personal with my own experience. In a hard-fought race in the 22nd District of California, my opponent and I both faced this new phenomenon in our current campaign situation. I am speaking now about $300,000 ads that were used to support me. And I opposed those ads because they were issue ads that did direct voters to vote for me but did not do so under current laws, which, in the right way, regulate the way campaigns should be run.

In other words, they did so under this giant loophole which we have allowed and these laws, these issues and the people behind them which are not disclosed, the amount of money that they can contribute is not limited, the source of their funds are not disclosed, and these ads are not accountable. ***They directly influence the way campaigns are handled.***

*It even became common knowledge in my race in the special election in California in March that eventually these issue people said,* ***candidates themselves will be incidental in congressional races,*** *that they are looking for these people who espouse particular issues, particular ideas about issues, who want to have a platform and they see the congressional campaign as a very good platform on which to run their issues."*

144 CONG. REC. H4870 (June 19, 1998).

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**Statement of Rep. BORSKI:**

*"During the 1996 elections, the television and radio airwaves were flooded with these sham issue ads – many of*



*which were negative attack ads.* Americans who see or here [sic] these ads have no idea who pays for them because no disclosure is required. *They drown out the voice of the average American citizen,* ***and even sometimes of the candidates themselves.*** Without reform, we can certain [sic] expect a huge increase in these sham issue ads."

145 CONG. REC. E1888 (Sept. 15, 1999).

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## III. CONGRESSIONAL STATEMENTS CONCERNING OPPOSITION TO TITLE II

**Statement of Sen. DEWINE:**

"Our amendment is very simple. It is a motion to strike title II, the Wellstone-Snowe-Jeffords provision from the underlying McCain-Feingold bill.

Mr. President, this amendment is necessary because *title II draws an arbitrary and capricious and unconstitutional line – a line that abridges the first amendment rights of U.S. citizens.* Under title II, citizens groups – and I emphasize that this is currently in the bill and unless our amendment is adopted, it will stay in the bill – American citizens would be prohibited from discussing on television or radio a candidate's voting records and positions within 60 days before a general election or 30 days before a primary.

*That is right, Mr. President, and Members of the Senate.* ***It would be illegal for citizens of this country, at the most crucial time, when free speech matters the most, when political speech matters the most – that is, right before an election – this Congress would be saying,*** *and the 'thought police' would be saying, the 'political speech police' would be saying that you cannot mention a candidate's name; you cannot criticize that candidate by name.*

*It silences the voices of the people. It silences them at a time when it is most important for those voices to be heard. It restricts citizens' ability to use the broadcast media to hold incumbents accountable for their voting records.* It says essentially that the only people who have a right to the most effective form of political speech, ***the only people allowed to use television or radio to freely express an opinion or to take a stand on an issue when it counts, when it is within days of an election, are the candidates themselves and the news media. But under the way the bill is written now, not the people – just candidates and the news media.*** Everyone else would be silenced by this unconstitutional, arbitrary line.



*Let's suppose for a minute that title II stays in the bill and it becomes law. Under this scenario, if you are a candidate running for Federal office and it is 60 days before the election, yes, you can go on the radio or the local television station and broadcast your message. If you are lucky enough to be Dan Rather, Tom Brokaw, or Peter Jennings,* or the person who anchors the 6 o'clock news or 7 o'clock news in Dayton, OH; or in Steubenville, OH; or in Cleveland, you can also talk about the issues and candidates, and you can talk about them together. *You can talk about the candidate's voting record.*

But if you don't fall into either one of these two categories – ***if you are part of a citizens group wanting to enter the political debate and engage in meaningful discourse, using the most wide-sweeping medium for reaching the people which is TV, under this provision you cannot do that. You simply cannot enter the debate using television or radio as a mode of communication.***

Title II of this bill makes that illegal. *So if you would go in to buy an ad and say you want to criticize where the ad mentions the name of a candidate who is up for election within that 60-day period, the local broadcaster would*

*have to turn to you and say, no, he cannot accept that.* It is illegal because the U.S. Congress has said it is illegal.

***Title II would make it illegal for citizens groups to take to the airwaves and even mention a political candidate by name. It would make it illegal to state something as simple as to tell the voters whether or not a candidate voted yes or no on an issue.*** *It basically just throws the rights of citizens groups out of the political ring. It throws them right out of the ring. I believe that is wrong and I think it is also unconstitutional.*

It represents a direct violation of the people's right to free political speech, the right guaranteed to us by the first amendment of the Bill of Rights in the Constitution of the United States of America.

***The language in this bill picks the time when political speech is the most important and restricts who can use that political speech, and who can engage in that political speech.***"

147 CONG. REC. S3024 (Mar. 28, 2001).

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**Statement of Sen. SANTORUM:**

"Assuming this is all held to be constitutional – and I agree with my colleague from Kentucky, I have grave doubts whether that will be the case, but assuming it will all be held constitutional, this will do several things.

No. 1, I got to the Senate and the House of Representatives as a challenger. I came out of nowhere in almost both those situations. I did it the hard way. I had support



basically from only one special interest group: the Republican Party. That was it.

In my first race for Congress, I was outspent 3 1/2 to 1. I think I got $10,000 in PAC contributions. I was a nobody. I was a guy who was knocking on doors. The Republican Party said: We will help him a little bit; we will get the folks organized to help out. And they gave me a little money. Guys like me are going to have a lot harder time getting to the Senate or the House of Representatives. None of the special interest groups was fighting for me because they did not think I had a chance. They are going to be the ones to hold the power now.

Political parties are not going to have the resources to support challengers. I heard this comment among my colleagues over and over – it is this frustration level, and I do not mean to point fingers and I will not, but ***I hear this frustrating comment from my colleagues who support this bill: I am sick and tired of all these people playing around in my election. I am tired of all these outside groups running ads in my election.***

Well, excuse me. Excuse me. Gee, ***I did not realize when I ran for office that this was my election. You see, I thought this was an election for the Senate or, before that, for the Congress. I certainly did not believe I had ownership of this election.*** *But I will tell you, in private meetings, over and over I hear this comment: I am sick and tired of all these people, all these speeches – speeches meaning ads – all these folks attacking me in my election; I want control back over my election.*

***'My election.' If you do not think this is an incumbent protection plan, I guarantee you have not***

***been listening. This is all about protecting incumbents. Do my colleagues think we are going to pass something which helps folks who run against us?*** *How many folks are going to say: I like being here, but I want to give the guy who takes me on a better shot at me? I can guarantee if my colleagues read this bill, there is no way they can see that.*

***All you bothersome people out there in America who believe you have some right to participate in my election, it keeps you at home.*** *You just stay home. Leave me alone 60 days before my election so I can do what I want to do and tell the people what I want to tell them.*

*That is the first thing this does – it shuts you up because – you know what? – you are an annoyance.* ***You guys go out there and say things I do not like, I do not agree with, and it may not be true, so we are just going to shut you up. That is the first thing this bill does."***

148 CONG. REC. S2132-33 (Mar. 20, 2002).

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**Statement of Rep. DELAY:**

"This bill does not contain real reform. Instead, *this bill strips citizens of their political rights and unconstitutionally attempts to regulate political speech.*

The primary protection of our first amendment is the right of average citizens to get together and to freely and fully criticize their government. Political speech is the key to political freedom, and *Shays-Meehan would radically weaken our first amendment right by inappropriately and*



*unwisely constraining the right to political speech.* Shays-Meehan denies Americans, denies American citizens their fundamental right to criticize politicians for 2 months before the election.

***Now, we all know that the last days before an election are a very crucial period of political dialogue. That is when voters are really paying attention, and that is the precise reason that this incumbent protection scheme that is in the bill will suppress political speech 60 days before Election Day. Shays-Meehan strengthens incumbents and makes it far harder for their constituents to hold them accountable.***

This is a sham. ***It shuts down the system, Mr. Chairman. It shuts down political speech. It shuts down the opportunity to participate in elections. In a country the size of the United States, an individual citizen has very little chance of joining the political debate without banding together with others, so by blocking citizens' groups from participating in days leading up to an election, Shays-Meehan removes a very vital tool that citizens can use to hold elected officials accountable.***

This is Swiss cheese. It is full of holes. It does not do what the authors want. It is like a fine wine that does not get better with age, it just rots."

148 CONG. REC. H342 (Feb. 13, 2002)

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## IV. CONGRESSIONAL STATEMENTS CONCERNING THE NEED TO RESTRICT *NRA*'S SPEECH

**Statement of Rep. PICKERING:**

"*Let me use the words of those who advocate this reform to tell what this legislation is all about.* They are very clear about their purposes.

Scott Harshberger, the president of the Washington D.C.-based Common Cause, says, '*We need to make the connection with every person who cares about gun control that* ***there is a need for campaign finance reform because that is how you are going to break their power.***'

He goes on to say, '*The equation,' he says, 'is a simple one.* ***A vote for campaign finance reform is a vote against the second amendment gun lobby.***' *It says, 'This is one of those times when there is a very direct connection.' They say, 'A vote for campaign finance reform is a vote for policies about guns.'*

*It is very clear that their intent here is to gut and to defeat those who want to advocate and defend the second amendment.* ***A vote here is to take away the rights of those on the first amendment, the freedom of speech, to help defeat those who want to defend the second amendment.***

This is about the second amendment. The whole underlying text of the legislation of this section is unconstitutional. I am convinced it will be struck down. *But we need to make sure that people know what is really going on right here. This is an attempt by their own words to defeat those who want to defend and protect the second amendment.* If one stands for the second amendment, if one



believes in the first amendment, then I urge my colleagues to support this amendment."

148 CONG. REC. H424 (Feb. 13, 2002).

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**Statement of Rep. SCHAKOWSKY:**

"Americans know that special interest money unduly influences elections and policy. ***If my colleagues care about gun control, then campaign finance reform is their issue so that the NRA does not call all the shots.*** If health care is my colleagues' issue, campaign finance reform is for them so they can be heard over the HMOs and insurance companies.

Ordinary people are wondering what the heck we are doing here. I urge the Speaker and my colleagues to do something to debate campaign finance reform now. Let us do it next week and get this bill on the floor to debate it."

145 CONG. REC. H3174 (May 14, 1999).

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**Statement of Rep. MEEHAN:**

"Madam Speaker, there is no doubt about it, money talks on Capitol Hill. And *for the Republican leadership, no money talks louder than gun money.*

The National Rifle Association has been the largest political donor to Members of Congress throughout the decade. In fact, the NRA soft money contributions to the Republican Party grew exponentially when the Republicans took over the House in 1994.

So it should come as a surprise to absolutely no one that the Republican leadership turned to the NRA to write their so-called 'gun Control' legislation, a proposal that is rife with loopholes.

The truth of the matter is that big money talks louder than kids' lives on Capitol Hill. Enormous soft money contributions have blinded the Republican leadership to 13 children who die every day in America in gun-related violence.

Let us stop the madness. *Let us start saving our children's lives by passing real gun control legislation, and let us pass campaign finance reform to cut the ties between gun money and Congress once and for all."*

145 CONG. REC. H4029 (June 10, 1999).

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**Statement of Rep. MEEHAN:**

"Mr. Chairman, this has been a long evening. But then again, this has been a long wait. I have been in the Congress now for 6 years trying to find some way to get campaign finance reform passed. And I remember when I first got here, sort of a brash young freshman legislator and I got together with another member from Oklahoma. He is a great Member, had a lot of experience, Mike Synar.

Mike had a lot of courage and he was smart. And he sat down with me and he said, 'If you want to work on campaign finance reform, boy, let me give you some tips. The first thing you have to do is you have to work with Republicans. Because if we, as Democrats,' and we were the majority party then, 'if we, as Democrats, propose our bill, it is not going to have credibility. We have got to get



Republicans on board. So the first thing you need to do is find a group of Republicans who are interested in truly passing campaign finance reform.'

And that is what we did. Every year that I have fought for campaign finance reform, I have worked with Republicans so that we could level the playing field equally among Democrats and Republicans.

The other thing that Mike Synar said was, 'You know what? My experience is that independent expenditures are the thing that are going to kill American politics because congressional elections are not going to be about the people who live back home anymore.'

*Mike Synar knew something about independent expenditures,* ***because the National Rifle Association and other groups spent millions over the years trying to defeat him.*** *So he said, 'Whenever you come up with a bipartisan bill, you got to make sure that you deal with independent expenditures.'"*

144 CONG. REC. H4821-22 (June 18, 1998).

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**Statement of Rep. SHAYS:**

*"For example,* ***the NRA, the National Rifle Association, may campaign against someone,*** *never bringing up the issue that they really oppose them on, that person supported the assault weapon ban,* ***and making it sound like that candidate is bad for other reasons.*** We want the NRA to just be up front and say it is their ad, and we want them to have to abide by all the rules that anyone else has to disclose where they get their money,

and raise their money under the requirements of the campaign law.

You will have pro-choice groups and pro-life groups that want to do the same thing. *And you have pro-assault weapon ban groups as well as the NRA that opposes the assault weapon ban.* So it is going to apply to everyone, and it should."

144 CONG. REC. H4044 (June 3, 1998).

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**Statement of Sen. FRIST:**

"The fundamental problem we talked about all last week, money in politics – is it corrupt, is it bad, is it evil? I say no, that is not the problem. *I come back to what the problem is – the candidate, the challenger, the incumbent does not have the voice they had historically.*

Let me show three charts. They will be basically the same format. It is pretty simple. There are seven funnels that money, resources, can be channeled through in campaign financing. I label the chart 'Who Spends the Money?' I will have these seven funnels on the next three charts.

*First, I have Joe Smith, the individual candidate who is out there campaigning. I said his, or her, voice over time has been diminished. Why? Because you have all of these other funnels – the issue groups:* ***We talked about the Sierra Club, the NRA, the hundreds of issue groups that are out there right now spending and overwhelming the voice of the individual candidate."***

147 CONG. REC. S2931 (Mar. 27, 2001).

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**Statement of Sen. REID:**

"I repeat, Mr. President, what I have said on this floor before. My friend and colleague, the other Senator from the State of Nevada, and I were involved in a bitterly contested race in 1998, a race in which we both spent about 4 million of hard dollars, campaign dollars. We spent $8 million between us. Then our State parties spent another $6 million each, or $12 million between them, on issue ads. That is $20 million total. These State party issue ads were all negative against my opponent and all negative against me. I do not think they did anything to better the body politic. They certainly did nothing to better people's feelings about who I think were two good people running for office.

That was not the end of it. ***Then we had independent expenditures coming in: the National Rifle Association, the League of Conservation Voters.*** *They would have ads running against me; people who believed in me would have ads running against my opponent.* I have no idea how much money these outside groups spent, but probably another $2 million to $3 million."

147 CONG. REC. S2851 (Mar. 26, 2001).

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## V. CONGRESSIONAL STATEMENTS CONCERNING SEVERABILITY OF WELLSTONE AMENDMENT IN LIGHT OF CONSTITUTIONAL CONCERNS

**Statement of Sen. FEINGOLD:**

"I have discussed here the original Snowe-Jeffords provision. The Wellstone amendment, in effect, broadens that provision to cover ads run by corporations and unions. ***I voted against adding that amendment. I thought and still think that it makes Snowe-Jeffords more susceptible to a constitutional challenge, but it passed when many Senators who oppose the bill and the Snowe-Jeffords provision voted for it.*** *In any event, the Wellstone amendment was written to be severable from the remainder of the Snowe-Jeffords provision.* ***That gives even more significance to the vote we will have today on severability. But if we win that vote, Snowe-Jeffords will survive even if the Wellstone amendment is held to be unconstitutional.***"

147 CONG. REC. S3073 (Mar. 29, 2001).

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**Statement of Sen. WELLSTONE:**

"Snowe-Jeffords forces disclosure of all ads that fall under this definition, but under this bill, only corporations and unions may not spend funds from their treasury or soft money for this purpose. If a corporation or union wishes to run electioneering communications, they must use a PAC with contributions regulated by Federal law to do so. *The point is, they have to do it with hard money. The point is,* ***every other group and organization, pick and choose – it can be the NRA, it can be the Christian right, it can be the Sierra Club,*** *it can be other organizations on the left, other organizations on the right, organizations representing every other kind of interest imaginable –* ***they can continue to use soft money and pour it into these sham ads.***



*Why are we not applying this prohibition to them?* Why are we creating this huge loophole? Do we want to pass a piece of legislation which is just like Jell-O? Push here, no, it doesn't go do parties and now it all goes into the sham issue ads.

We will not be doing right for people in the country if we pass a bill that *does not get, really, very much* ***big money out of politics*** *but just changes the way it is spent.* Maybe it will even be less accountable.

Here is the exemption in this bill for certain organizations: 501(c)(4) groups and 527 groups – ***this exemption means that Sierra Club, National Rifle Association, Club for Growth, or Republicans for Clean Air would be able to run whatever ads they want using soft money to finance them.*** *They would, for the first time, have to disclose how much they are spending, but there is no bar to such groups running sham ads under this bill.*

*Fine. They can disclose how much they are spending. Three weeks before election, they pour in an unlimited amount of money with* ***poison politics*** *attacking Republicans, I say to the Chair, or Democrats, or independents. Why do we want to have this loophole?*

*I want to see this* soft money prohibition and this ***big money out***. I do not want to see us have this loophole in this piece of legislation which may mean that we passed a piece of legislation that has shifted all of this big money in

the worst possible direction. I think this is a mistake. *Already these interest groups are spending over $100 million on sham ads to influence our elections.* ***Over 70 percent of them are bitterly personally negative.***

*So these groups already play a major role in our elections,* and I predict, *if we do not close this loophole now with this amendment, we will be back here* in 2 years or 4 years, or I hope and pray people do not – maybe it will not be for another 20 or 30 years – trying to do what I am *trying to do today.* ***The reason will be that the center of power*** – please listen to this – *in Federal elections will move much closer to these unaccountable groups because they will be able to pump millions and millions of dollars in soft money into these sham ads.* That is where this money is going to go.

We will see what the other arguments on the floor are. I can anticipate some of them, and I will continue to make mine brief. But I say to the Presiding Officer, I do not know how many votes this amendment will get. I really do not know. But I will tell you this. My wife's family are from Appalachia – Harlan County, and Letcher County in Kentucky – the Isons. They talk about poor cities. When I am 80 years old, I at least am going to be able to tell my grandchildren – I am sorry, I have grandchildren now – my great grandchildren, great, great, great grandchildren, I hope and pray – that *I laid down this amendment, I tried to close this loophole, I tried to do something that for sure would get more of the big money out of politics.*

I do not know what the vote will be, but I know I am here, and I know I have to be a reformer, and I know I have to make this bill better. I have to lay down this marker just as I tried to do last week in an amendment



that should have passed. I cannot believe that colleagues, authors of this bill, did not support it. I cannot believe that during the vote I had people telling me: I don't want my State legislature or people in my State telling me how to finance my campaign – as if it were our campaign. I could not believe it.

I say to the Presiding Officer, I could not believe Republicans, who always argue for States rights, voted against the proposition that every State ought to decide whether or not they wanted on a voluntary basis to apply some system of voluntary or partial public financing. Talk about encouraging grassroots politics. People in the country say: We can get at it in Arizona. They already have. You have clean money, clean elections. We can get at it in Minnesota, in Nevada. We don't know if we can ever be effective in D.C. toward public financing, but we can do it right here, we don't have to take expensive air trips to D.C. And it is defeated. Now I am trying to plug this loophole, and tomorrow or the next day we are heading towards raising spending limits.

Let me be clear, this amendment does not say any special interest group cannot run an ad. A lot of interests are special. That is fine. They are special to the people they represent, and sometimes they are special to the public interest, depending on your point of view. It only says these groups and organizations need to comply with the same rules as unions and corporations. Groups covered by my amendment can set up PACs, they can solicit contributions, and they can run all the ads they want. All this amendment says is they cannot use their regular treasury money. They can't use the soft money contributions to run these ads.

This is an amendment about fairness. *It is an amendment about leveling the playing field.*

*I know some of my colleagues may come to the floor and oppose this amendment because*, while they believe as a matter of policy this amendment is the right thing to do, *they fear the Court may find that covering these special interest groups under the Snowe-Jeffords electioneering communication provision is unconstitutional. And, in all honesty, this is probably a question upon which reasonable reformers can disagree.* But it is a debate worth having. I think this provision can withstand constitutional scrutiny, but it is probably not a slam-dunk.

Still, in a moment I want to talk about why I think the courts will uphold this amendment. But before I do – this has to be in the summary of this amendment tomorrow, before people vote – I want to make one important point. ***I have drafted this amendment to be fully severable.*** *I have drafted this amendment to be fully severable.* ***In other words, no one can suggest that even if the courts find this amendment unconstitutional, it would drag down the rest of this bill or even jeopardize the other provisions of Snowe-Jeffords.***

*This creates a totally new section under title II of this bill. Under the worst case scenario,* ***if the Supreme Court rules that groups covered by my amendment cannot be constitutionally barred from using treasury funds for these sham issue ads, then the rest of the legislation will be completel unaffected.*** The rest of the legislation will be comple ely unaffected. And we are going to have a debate on severability anyway."

147 CONG. REC. S2847 (Mar. 26, 2001).

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**Statement of Sen. EDWARDS:**

*"What has been done with Snowe-Jeffords is a very careful effort to make sure the constitutional requirements of Buckley v. Valeo have been met.* In fact, they have been met. It is not vague; it establishes a very clear bright-line test so we don't have a vagueness constitutional problem. We also don't have a problem of substantial overbreadth because all of the empirical evidence shows 99 percent of ads that meet the test are, in fact, election campaign ads and constitute electioneering.

*Snowe-Jeffords has been very carefully crafted. It is narrow.* It specifically meets the requirements of Buckley v. Valeo, the constitutional requirement.

The problem with what Senator Wellstone is attempting to do is there is a U.S. Supreme Court case, the FEC v. The Massachusetts Citizens for Life, that is directly on point, saying that these 501(c)(4)s have a limited constitutional right to engage in electioneering to do campaign ads. There are some limits, but unfortunately if you lump them in with unions and for-profit corporations, you create a very serious constitutional problem because the U.S. Supreme Court has already specifically addressed that issue.

***So the reason Senator Feingold and Senator McCain are opposing this amendment is the same reason that I oppose this amendment: It raises very serious constitutional problems.*** *The U.S. Supreme Court, in fact, in 1984 specifically ruled on this question.*

*What we urge the Members of the Senate to do is not support this amendment, to vote for tabling. Those people who are in favor of real and meaningful campaign finance*

*reform we hope will support Snowe-Jeffords, support McCain-Feingold, and vote to table the Wellstone amendment."*

147 CONG. REC. S2883 (Mar. 26, 2001).

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**Statement of Sen. SCHUMER:**

"I will close by reemphasizing what the Senators from Arizona and Wisconsin have so often and eloquently said in the course of this debate. I plead with my colleagues, we cannot let the perfect be the enemy of the good. On this side of the aisle, *I say to my colleagues, even if you are unhappy with the delicate balance of 501(c)(4) organizations,* ***even if you realize they may not be limited once the courts get hold of this, don't throw out the baby with the bath water.*** The good in this bill is more than just good, it is great. It is a landmark achievement, the first serious reform in a generation. And we should strive to preserve it, not kick the can across the street to the Supreme Court."

147 CONG. REC. S3103 (Mar. 29, 2001).

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## VI. CONGRESSIONAL STATEMENTS CONCERNING THE DESIGN OF WELLSTONE AMENDMENT TO CURB *INDIVIDUAL* EXPENDITURES

**Statement of Sen. WELLSTONE:**

"I am going to say it one more time. I don't know whether this amendment will pass. I do not know whether it will get one vote. But I tell you this: I am going to be able to say later on that I at least tried to get this reform amendment passed. This is a huge loophole. In the Shays-Meehan bill, they plugged the loophole. In the original Feingold bill, they plugged the loophole.

I will say it again. How can you say to corporations and to labor that they can't run these sham issue ads in the 60-day period before elections and the 30-day period before primaries but at the same time not apply that prohibition to every other group and organization, whatever cause they represent?

And, No. 2, don't you realize that what everybody is going to do is set up another one of these groups and organizations? Then you will have a proliferation of influence groups and organizations. And ***individuals with all of this wealth*** and organizations that want to make these huge soft money contributions ***will make their soft money contributions to these sham issue ads run by all of these groups and organizations,*** *which under this loophole can operate with impunity.*

We are going to take soft money out of parties and we are going to put it into the sham issue ads. Frankly, I don't want my colleague from Kentucky to count me as an ally. If I am going to be the subject of these kinds of poisonous ads, I would rather point my finger at the Republicans. Or

if I were a Republican, I would rather point my finger at the Democrats. Or I would rather point my finger at the opposing candidates. I wouldn't want to be put in a position of not knowing exactly who these different groups and organizations were with all of this soft money pouring into these poisonous ads in the last 3 weeks before the election. That is the loophole that we have.

I am not telling you that some of these groups and organizations, right, left, and center, are going to necessarily like this. But I am telling you, if you want to be consistent, that we have to support this amendment. If we don't want a huge loophole that is going to create maybe just as much soft money in politics as now, you have to support this amendment."

147 CONG. REC. S2848 (Mar. 26, 2001).

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**Statement of Sen. WELLSTONE:**

"Mr. President, this is a book. I don't agree with all of its analyses. It has a catchy title and was written by Jim Hightower. The title is, 'If The Gods Had Meant Us To Vote, They'd Have Given Us Candidates.'

*The reason I mention this book is there is this one graphic that is interesting: The percentage of the American people who donate money to national political candidates. Ninety-six percent of the American people donate zero dollars. The percentage who donate up to $200 is 4 percent. The percentage who donate $200 to $1,000 is .09 percent. And the percentage who donate $1,000 to $10,000 is .05 percent.* ***The percentage who donate from $10,000 to $100,000*** – and he points out in his book that you need a magnifying glass for this one – ***is .002 percent.***



The percentage who donated $100,000 or more – you need a Hubble telescope, he says, for this one – is .0001 percent.

I use this graph from my friend Jim Hightower's book for two reasons. First of all, ***I have an amendment that tries to make sure a lot of this big money doesn't get*** – it is like Jell-O, you push it here, it shifts. It shifts from the party into the sham issue ads, not to the corporation, not to labor, but to every other group and organization. There will be a proliferation of it. This amendment plugs that loophole.

The Shays-Meehan bill basically has the same approach. This was originally part of the Feingold-McCain bill. I made it clear this provision is 100-percent severable. This is a separate provision. In any case, we will have a debate on severability. I have made it clear it is hard to make the argument that when a majority vote, you can't make the argument that to vote for this reform would bring the bill down.

I think we voted for other reforms that have a better chance of bringing down the bill. But it doesn't make sense. You say the majority voted for this amendment; now they are going to vote against the bill that has this amendment.

The other point I want to make is with this graph, what we are doing here is voting down reform amendments, such as the amendment last week that would have allowed States to light a candle and move forward with some voluntary system of partial or public financing, or maybe vote down this amendment, which would be a terrible mistake.

We are going to revisit this. This is going to be the loophole, I promise you. Let's do the job now, while we can. At the same time, they want to raise the hard money limits. Now we are supposed to feel better that we have gotten rid of a lot of soft money. That is what is significant about this effort by Senators McCain and Feingold. That is a significance that cannot be denied. But the problem is, it may shift to the sham issue ad. The other problem is, since 80 percent of the money spent in 2000 was hard money, PAC money included, you are going to raise the hard money limits.

It is crystal clear what people are talking about with one another. Why are we going to do that? ***Why are we going to bring yet more big money into politics and make people running for office more dependent on the top 1 percent of the population?*** How did that get to be a reform? And then I hear Senators say, well, the point is, if you go from 1 to 3 or 2 to 6, we will have to spend only one-third of the time.

Permit me to be skeptical. Everybody will be involved in this obscene money chase. They will be just chasing $3,000 contributions and $6,000 contributions. Somehow, people in Minnesota are going to be more reassured that we are putting more emphasis on the people who can afford to make $3,000 or $6,000, or maybe it will go from 1 to 2, or 2 to 4, and we are doing something that gives people more confidence in a political process that is more dependent upon the *people who have the big bucks*."

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